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No. 80-477

IN THE

Supreme Court of the United States

October Term, 1980

AD HOC '78, T. MILTON STREET,

Petitioners,

v.

ROUSE PHILADELPHIA INC.; REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA; GIMBEL BROTHERS, INC.; and the GIMBEL BROTHERS REALTY CORPORATION,

Respondents.

On Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is A Community Organization Exercising Rights Secured Under The First Amendment When, In Order To Communicate Grievances And Promote A Change In Government Policy Regarding The Expenditure Of Public Development Monies, It Urges Others Not To Patronize Businesses In A Building Complex Which Was Substantially Developed And Being Expanded With Public Development Monies.

2. Is An Injunction Prohibiting All Speech, Handbilling, Picketing And Assembling In The City Of Philadelphia Urging A Boycott Of Businesses In A Building Complex Substantially Developed And Being Expanded With Public Development Monies Constitutional Under The First Amendment, When The Objective Of The Boycott Is To Communicate A Message To Government Regarding Policy On The Expenditure Of Public Development Funds.

3. Is The Injunction Prohibiting All Speech, Handbilling, Picketing, Assembling And Other Activity Anywhere In The City Of Philadelphia Urging A Boycott Unconstitutionally Overbroad Because It Improperly Enjoins Protected Activity Under The First Amendment.

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OPINIONS OF THE COURTS BELOW

The opinion of the Superior Court of Pennsylvania has not yet been reported in the official reports, Superior Court Reports, or Atlantic 2nd. It is reprinted in the appendix at p. A1. The opinion of the Court of Common Pleas has not yet been reported in Pa. D. & C. 2d, but has been published in 180 *The Legal Intelligencer* No. 24 (2/5/79). It is reprinted in the appendix at p. A21.

JURISDICTIONAL STATEMENT

The judgment of the Superior Court of Pennsylvania was entered on December 28, 1979. Appendix at p. A164. A Petition For Allowance Of Appeal was filed with the Supreme Court of Pennsylvania on January 25, 1980. The Petition For Allowance Of Appeal was denied by the Supreme Court of Pennsylvania on June 27, 1980. Appendix at p. A163. Jurisdiction to review the judgment of the Superior Court of Pennsylvania by writ of certiorari is conferred by 28 U. S. C. § 1257(3). See, *Organization For A Better Austin v. Keefe*, 402 U. S. 415 (1971).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case concerns the urging of a boycott of a publicly developed building known as the Gallery in order to petition and communicate grievances to government for the purpose of changing public policies regarding the expenditures of public development monies in the City of Philadelphia.

On August 25, 1978 a large group of minority persons gathered at 9th and Market Streets in Philadelphia to demonstrate, protest and initiate an urging of the boycott against the Gallery. "The protest inside and outside the Gallery was peaceful. There was no actual violence or threats of violence or destruction of property." Appendix at p. A30.

The Gallery is a four-level mall located in downtown Philadelphia. Respondent Rouse Corporation leases places of business within the Gallery from the governmental owner, the Redevelopment Authority of the City of Philadelphia (RDA) and subleases stores in the Gallery to approximately ninety-four merchants. Gimbels owns and operates a department store at the end of the Gallery. Appendix at p. A29. The property they own was acquired by RDA through the condemnation process. Appendix at p. A72.

RDA spent approximately 24.5 million dollars of federal Urban Renewal Funds to acquire the land and construct the Gallery. Appendix at p. A75. The monies that were used to construct the Gallery were federal Urban Renewal monies that could have been used to develop housing in local Philadelphia communities. (N. T. Vol. VIII pp. 112-113). These federal funds were used to construct the exterior shell and public areas of the building. The City of Philadelphia additionally spent over a million dollars in the construction of the Gallery. Appendix at p. A75. RDA not only owns the Gallery but also

was the developer and general contractor for construction of the Gallery. Appendix at p. A30. Inside the Gallery, on each level, there are large public areas which are not leased to Rouse. Appendix at p. A73.

The City has allocated 12 million dollars for the expansion of the current Gallery. In addition, over one hundred million dollars of public development money is proposed to be spent on the construction of the expansion of the Gallery. (N. T. Vol. VII, pp 51-53).

The protestors were led by petitioner T. Milton Street who is a representative of and Chairman of Ad Hoc '78, an association of various community organizations. Appendix at p. A30. He has been seeking to change government policy regarding the expenditure of public monies for housing and community development. Appendix at p. A24.

The protestors, as found by the trial court, were "convinced that they have been given a runaround; that the government funds have been distributed discriminatorily" and that they had "raised questions in good faith as to the fairness of the City's area allocations and designations for the use of federal funds for housing purposes." Appendix at p. 24. The trial court also found that "there is substantial and disturbing indication that the black communities may not have been fairly and equally treated. . ." Appendix at p. A24.

The trial court found that:

> In order to highlight their complaints against the manner in which the federal, state and city government have distributed government funds, the defendants selected the Gallery as a target of protest because it represents a highly successful example of an area that has received government funds in the course of urban renewal. Appendix at p. A24.

The protestors urged the public to boycott the Gallery.[1] The purpose of the boycott of the Gallery was set forth by T. Milton Street in the Common Pleas Court opinion:

> I think that Center City, Market Street East should be developed, but I think it should be developed mutually with the development of the communities. What we had hoped to happen is to *send a message to the City, to the federal government, to whomever it is necessary, that* you can develop Center City and ignore the communities if you want to, but *we will not support you as long as you continue to ignore the needs of the community, the housing needs of the communities where we live.* We will not support the Gallery, we will not support your new Gallery, we will not support your new Gallery that's coming, until you change your policy to begin to address yourself to some of the needs that we have in the community where we live. Appendix at p. A38. (emphasis added)

The Common Pleas Court found that the "motivation underlying the boycott" was that:

> The defendants feel they have come away (comparatively) empty-handed in their attempts to secure housing monies and commitments from the City of Philadelphia and the federal government. Sensing that they have exhausted their administrative and political remedies, they have embarked on a new course of action—the boycott of the Gallery.

1. The caption of the case below included all of respondents as plaintiffs and the following as defendants: Ad Hoc '78, T. Milton Street as an individual and as a representative of Ad Hoc '78, John Doe and Jane Doe and All Other Persons Acting in Concert with the Named Participants or Otherwise Participating in Their Aid.

Through this effort, they seek to communicate their grievances to the government. Appendix at p. A44. (emphasis added)

In addition to the above, the protestors demonstrated against the fact that the Gallery businesses were not owned by minorities.

The Common Pleas Court concluded that the protestors were engaged in unlawful "scapegoat boycotting." The court found that since there was "no real or actual dispute" with the Gallery or its merchants and that the Gallery was "defenseless to meet the demands of the picketers", urging the boycott was unlawful. Appendix at p. A43. The court stated that the "strategy" to "financially injure" the businesses in the Gallery through the boycott in order to communicate their grievances to government regarding expenditure of public monies, was a "malicious use" of "First Amendment rights." Appendix at pp. A44-A45. The court held that the boycott was unlawful because it was in violation of Pennsylvania tort law (inducing a refusal to deal) and the "public policy of the state" to support and develop the Gallery. Appendix at pp. A57-A58.[2]

On January 31, 1979[3] the Common Pleas Court preliminarily enjoined:

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2. The trial court also found that some of the protestors had engaged in acts of misconduct. It stated that after the temporary injunction was issued on August 31, 1978, some of the conduct was "improper, illegal and in violation of this Court's injunction order" Appendix at p. A88. The trial court however, did not issue its sweeping injunction on all speech urging a boycott of the Gallery based on the conduct of the protestors but because it was an "unlawful boycott."

3. On August 31, 1978, by agreement of the parties, the trial court had issued a temporary injunction enjoining "mass picketing and defining permissible conduct." Appendix at pp. A31-A32.

> [P]icketing, handbilling, speechmaking, demonstrating, and boycotting inside or outside the Gallery or Gimbels, . . . Appendix at p. A67.[4]

On February 28 1978 the court entered a preliminary injunction "modifying, amending and amplifying" the January 31st order. This order enjoined petitioners:

> [f]rom engaging in a (scapegoat) boycott of the Gallery or any of the businesses therein or of Gimbel Brothers, Inc., or of Rouse Philadelphia Inc., and from picketing, handbilling, speechmaking, demonstrating or taking any other action in support of a boycott of the Gallery, or any of the businesses therein, Rouse Philadelphia Inc., or Gimbel Brothers, Inc., inside or outside The Gallery or Gimbels. All picketing, handbilling, speechmaking, demonstrating or other conduct in support of such boycott is unlawful and is hereby enjoined. All such conduct in

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4. The Common Pleas Court issued an opinion and findings of facts and conclusions of law in support of its order. In addition, the court stated, Appendix at p. A64:

> We are also filing herein a Supplemental Opinion upon the assumption that our conclusions that all boycott activity must be enjoined is incorrect. In the Supplemental Opinion we have considered the manner in which boycott activity, if lawful, may be conducted.

The court then attached the supplemental opinion and an unsigned order. Appendix at p. A111.

The Common Pleas Court did not decide whether RDA was entitled to relief. The court held "there is a dispute between the defendants and the RDA insofar as the RDA is a government agency which the defendant claims is dominated by the governmental authorities and administration which the defendants accuse of discrimination." Appendix at p. A28.

furtherance or support of such unlawful boycott is prohibited in the City and County of Philadelphia. . . . Appendix at p. A159.

The January 31, and February 28, 1979 orders were appealed to the Superior Court of Pennsylvania and on December 28, 1979 the Superior Court affirmed the orders of the Common Pleas Court.[5]

In affirming the February 28, 1979 order, the Superior Court of Pennsylvania upheld an order enjoining *any* activity or speech in the City of Philadelphia which would urge the boycott of the Gallery. The Superior Court concluded that the injunction was constitutional because the activities were a "scapegoat boycott", in that the target of the boycott had no dispute with the protestors. This conclusion was apparently based on the "unlawful purpose doctrine" which holds that picketing for an unlawful purpose can be enjoined. *Hughes v. Superior Ct.*, 339 U. S. 460 (1950). The Superior Court held that urging a boycott was for an unlawful purpose because it was a "tortious interference with the business relations", extortion and it was aimed at interfering with the Commonwealth's public policy to promote the economy by building the Gallery. The Superior Court also held that the conduct of the protestors justified the sweeping injunction entered by the court.[6]

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5. Petitioner T. Milton Street also appealed a finding of civil contempt, which was also affirmed. This order is not sought to be reviewed by this Court. Petitioners seek review of that part of the December 28, 1979 order of the Superior Court which affirmed the January 31, and the February 28, 1979 orders of the Common Pleas Court.

6. The Superior Court inferred that petitioners had urged that since they were protesting the allocation of government monies, their conduct could not be regulated by the court. Petitioners have never made such an argument. Petitioners expressly recog-

On January 25, 1980 petitioners filed a petition for allowance of appeal with the Supreme Court of Pennsylvania which petition was denied on June 27, 1980.

As set forth *supra*, the First Amendment issues sought to be reviewed by this Court were raised and decided in the court of first instance, the Common Pleas Court, and the Superior Court of Pennsylvania. Petitioners sought to have these issues reviewed before the Supreme Court of Pennsylvania but their Petition For Allowance Of Appeal was denied by that Court.[7] Specifically, the First Amendment issues sought to be reviewed by this Court were raised by petitioners in briefs filed with the Common Pleas Court and decided by the court in their opinion of January 31, 1979. Appendix at pp. A32-A63. In that opinion, the court held that it could constitutionally, under the First Amendment, enjoin all speech, picketing, handbilling and demonstrating urging a boycott of the Gallery.

The First Amendment issues sought to be reviewed by this Court were also raised on appeal in briefs before the Superior Court of Pennsylvania and decided by the

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6. (Cont'd.)

nized in the Common Pleas and Superior Court that the courts can regulate the time, place and manner of First Amendment activity, *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 98 (1972) and that the court could enjoin unprotected conduct.

The Common Pleas Court issued its injunction based on its theory of scapegoat boycott and *not* the conduct of the petitioners. This is made clear by the fact that no relief was granted RDA by the Common Pleas Court because of their status as a government agency. Appendix at p. A28. If the Common Pleas Court held the conduct of the protestors justified a total ban on all speech and activity in the City of Philadelphia, the status of RDA would have been irrelevant.

7. The questions sought to be reviewed before the Pennsylvania Supreme Court appear in the Appendix, p. A166.

Superior Court of Pennsylvania in their opinion of December 28, 1979. Appendix at pp. A5-A15. The Superior Court held that the orders of the Common Pleas Court were not unconstitutional under the First Amendment.[8]

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8. Although the Superior Court made virtually no mention in its opinion of the February 28, 1979 order of the Common Pleas Court, its order of December 28, 1979 affirmed that order (Superior Court of Pennsylvania, October Term, 1979, No. 444). The scope and breadth of the injunction order of February 28, 1979 were specifically raised before the Superior Court in petitioners' briefs filed with that Court. See, e.g., Appellants' Brief In The Superior Court, pp. 12, 29, 37, 51-55, Appellants' Reply Brief In The Superior Court, pp. 1, 5, 32. It was also raised in the Petition For Allowance Of Appeal filed with the Pennsylvania Supreme Court. Appendix at p. A166.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I

The Decision of the Superior Court Raises Important and Novel Questions Concerning the First Amendment to the United States Constitution Which Have Not Been, But Should Be Settled by This Court.

The order and decision of the Superior Court upholds an injunction prohibiting *all* speech, handbilling, demonstrating and picketing anywhere in the City of Philadelphia in support of a boycott of businesses in a publicly developed building called the Gallery. The nature and scope of this order raises novel and serious questions of immediate public importance regarding the scope and application of the First Amendment.

The Common Pleas Court and the Superior Court determined that the urging of a boycott of the Gallery was unlawful because it was a "scapegoat boycott". It defined a scapegoat boycott as boycotting a target with which the boycotters have "no real or bonafide dispute" for the "purpose of protesting against and symbolizing protest against actions and conduct of third parties." Appendix at p. A10.[9] The Superior Court upheld the urging

9. The essence of this theory is that the Gallery was an inappropriate focus of petitioners' protests as it was the court's view that the petitioners' real dispute was with the state and federal governments. This conclusion is factually and logically assailable. As the court acknowledged, the protestors' message was that more city and federal funds should be directed to meet their housing needs as opposed to being expended upon commercial developments such as the Gallery and its expansion. The Common Pleas Court found that the Redevelopment Authority of the City of Philadelphia (RDA) was the agency responsible for effectuating the purposes of the Urban Redevelopment Act in the City of Philadelphia; that the RDA planned, promoted and developed the Gallery; and that over 24.5 million dollars of federal money was

of a "scapegoat boycott" as being unlawful and not protected by the First Amendment to the United States Constitution. This Court has never addressed this issue.

In enjoining the urging of a boycott because there is "no dispute" with the "target", the state appellate court failed to recognize the constitutional significance of the First Amendment's protection of political speech and association. The urging of the boycott of the Gallery was a method of communicating a valid message to government to change public policies concerning the expenditure of public funds.[10] This was clearly not a boycott organized for private economic interests and had no commercial

9. (Cont'd.)
spent on the Project with millions planned to be spent on its expansion.

In light of the issues involved in the protest it is difficult to imagine a more appropriate focus for the boycott than the Gallery. It is clear that both federal and city government play active and important roles in developing and expanding the Gallery; moreover, no matter how laudable the governmental goals in establishing the Gallery, it is precisely this policy with which the petitioners disagree.

In determining there was no "merit" to the protestors dispute with respondent Rouse regarding the lack of black owned businesses, the Superior Court erred in examining the "truth or validity" of communicative speech in a First Amendment injunction case. *Organization For A Better Austin v. Keefe,* 402 U. S. 415, 418 (1971).

10. The Common Pleas Court specifically held that:

> There is no doubt that the *defendants raise questions in good faith as to the fairness of the City's area allocations and designations for the use of federal funds for housing purposes.* Appendix at p. A24. (emphasis added)

and

> The defendants have the right to contend that the urban renewal funds used to correct circumstances of center city blight should more wisely and more fairly be used to correct circumstances of housing blight in North Central Philadelphia. Appendix at p. A28.

motivation or goal. It was urged by persons and organizations devoted to political and social goals rather than profit. In essence, it was a "political boycott", aimed at changing the policies of government. Protesting government policy is "essential political speech lying at the core of the First Amendment." *Henry v. First National Bank of Clarksdale,* 595 F. 2d 291, 303 (5th Cir. 1979), *cert. denied* 100 S. Ct. 1020 (1980).

The Superior Court cited no precedents that political boycotts for the "purpose of protesting against and symbolizing protest against actions and conduct of third parties" are unlawful. Appendix at p. A11. Numerous federal courts, however have upheld "political" boycotts against "targets" where a "dispute" existed with a governmental third party as a valid protest against government policies. *Missouri v. National Organization for Women,* 620 F. 2d 1301 (8th Cir. 1980), *cert. pending,* No. 79-2037, October Term, 1980 (boycott of convention sites in states which failed to ratify the Equal Rights Amendment); *Henry v. First National Bank of Clarksdale, supra* (boycott against businesses to protest government policies); *Machesky v. Bizell,* 414 F. 2d 283 (5th Cir. 1969) (boycott of businesses to protest government policies). The use of the political boycott as a method of protesting public policy has been an integral part of the history of free expression in this country.[11]

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11. In 1765, the Parliament of England passed the Stamp Act which imposed "stamp duties" on virtually everything written or printed in the American colonies: deeds, decrees, licenses, indentures, pamphlets and even playing cards. In Philadelphia, as a protest to the Stamp Act, persons were urged to boycott the merchants of England (who were unrelated to the dispute) by refusing to import any goods until the Stamp Act was repealed. With the help of Benjamin Franklin, who helped organize the boycott, the Stamp Act was repealed. *A Rising People, The Founding Of the*

II

The Decision of the Superior Court Is in Conflict With Decisions of This Court and Other Federal Courts of Appeals

A. Political Boycotts Aimed at Changing Public Policy

Although this Court has never decided the issue, several federal courts of appeals have held that "political" boycotts aimed at third parties to change public policy are protected activity under the First Amendment. These decisions conflict with the decision of the Superior Court.

Recently in *State of Missouri v. National Organization For Women, Inc., supra,* the Eighth Circuit upheld the right of an organization to use a politically motivated boycott against convention sites to change public policy. The National Organization for Women organized a convention boycott in all states that had not ratified the proposed Equal Rights Amendment. The effect was that the "Missouri motels and restaurants catering to the convention trade and the Missouri economy as a whole, were suffering business losses." *Id.* at 1302. Although the businesses in Missouri were powerless to meet the goals of the organization and the boycott inflicted economic harm, the Court upheld the political boycott activity under the First Amendment.[12]

Similarly, in *Henry v. First National Bank of Clarksdale, supra,* the Fifth Circuit prevented an analogous

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11. (Cont'd.)

United States, 1765-1789, Historical Society of Philadelphia, pp. 2-9, 1976.

Within the past year, this nation, as a matter of national policy has engaged in a political boycott of the Olympic Games in Moscow to protest the foreign policy of the U. S. S. R.

12. A certiorari petition in this case is pending before this Court, No. 79-2037, October Term, 1980.

effort to stop a political boycott aimed at changing public policy. That case involved a boycott conducted by the NAACP and other civil rights groups in Port Gibson, Mississippi to protest the City's racially discriminatory policies. The court noted that the boycotting groups were not in competition with the boycotted businesses, nor were they motivated by economic interests, but rather were engaged in picketing, speeches, and other communication "directed to the elimination of racial discrimination in the town." 595 F. 2d at 303. Such activities, the court found, constitute "essential political speech lying at the core of the First Amendment." *Ibid.* See also, *Machesky v. Bizell, supra.*

The Superior Court decision conflicts with the decision of these courts and requires this Court to resolve fundamental questions regarding First Amendment activity.

B. The Misapplication of the Unlawful Purpose Doctrine

The Superior Court's apparent rationale for finding "the urging of a scapegoat boycott" unlawful was based on cases where this Court has enjoined *picketing* under the "unlawful purpose doctrine." *Hughes v. Superior Court,* 339 U. S. 460 (1950). The use of this doctrine to prohibit all speech and other protected activity, in addition to picketing, is contrary to the holdings of this Court that have established the unlawful purpose doctrine. In situations involving pure speech, advocacy of an unlawful purpose is permissible. *Brandenburg v. Ohio,* 395 U. S. 444 (1969).

Following the holding in *Thornhill v. Alabama,* 310 U. S. 88 (1940), that picketing is protected by the First Amendment, this Court has held that since picketing involved some elements other than pure speech it was sub-

ject to regulations which, if applied to "pure speech",[13] would be unconstitutional.

This Court stated that it is the "speech plus" or "coercive" power of picketing which sets it apart from pure speech:

> [W]hile picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." Mr. Justice Douglas, joined by Black and Murphy, JJ., concurring in *Bakery and Pastry Drivers & Helpers Local v. Wohl*, 315 U. S. 769, 775, 776. Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. *Hughes v. Superior Court*, 339 U. S. 460, 464-65 (1949).

The power of picketing to accomplish its goals not through reason or communication, but through other non-

13. "Pure speech" is subject to constitutional limitations but such speech falls into a few narrowly defined categories. *Miller v. California*, 413 U. S. 15 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 316 U. S. 568 (1942) (fighting words) and *Brandenburg v. Ohio, supra*, (speech causing clear and present danger of imminent lawless action.) Through the doctrine of prior restraint this Court, however, has severely limited the use of injunctive power to prohibit speech. *Organization For A Better Austin v. Keefe*, 402 U. S. 415, 419 (1971). By enjoining "pure speech" in this case, the Superior Court has violated this doctrine.

communicative means, renders it susceptible to regulation. Yet the Superior Court applied the rationale of these cases to prohibit "pure" speech and other protected activity unrelated to the picketing activity, e.g., handbilling, anywhere in the City of Philadelphia.

As to the picketing involved in this case, the Superior Court misapplied decisions of this Court which have enjoined picketing for an unlawful purpose. The thrust of those cases is that a court can enjoin picketing when it seeks to produce a result which violates state law or clearly defined public policy. *American Radio Association v. Mobile Steamship Association,* 419 U. S. 215 (1974); *Giboney v. Empire Storage and Ice Co.,* 336 U. S. 490 (1949); *Hughes v. Superior Ct., supra.*

The Common Pleas Court acknowledged that the purpose of the picketing was urging a boycott to protest against and change the discriminatory expenditure of public funds. This is not an illegal result which violates any law or clearly defined public policy. Since the *only* constitutional justification for regulating picketing is derived from the power to prohibit the result, any attempt to regulate picketing where the state could not regulate the result is patently unconstitutional; any such law would be directed to the speech rather than the action component of picketing.

The Superior Court lost sight of this derivative quality to the unlawful purpose doctrine. The court identified no possible result of the picketing which the state could legitimately regulate.[14] Instead the Court entangled itself

14. The fact that economic harm may or will result as a consequence of picketing and other protected First Amendment activity is not a basis for granting injunctive relief. Otherwise, all boycotts and picketing would be enjoinable by the mere fact that they induced others not to patronize a particular place of business. See, *Organization For A Better Austin v. Keefe, supra.*

in the very inquiry which the First Amendment is at its core designed to protect against: a judicial consideration of whether the state approves or disapproves of the *speech* itself. In short, the protestors were silenced not because their picketing sought to produce an illegal result, but because the Court disagreed with what they had to say. See, *Police Dept. of City of Chicago v. Mosley*, 408 U. S. 92, 95 (1972).

The Superior Court's conclusion that the urging of a boycott of the Gallery was for an unlawful purpose because it was a tortious interference with business relations[15] conflicts with other federal appellate courts.

These courts have recognized the constitutional right grounded in the First Amendment to urge a refusal to deal for political purposes. See, *e.g.*, *State of Missouri v. National Organization For Women, supra; Machesky v. Bizzell, supra.* Use of tort law to enjoin the urging of a politically motivated boycott is in direct violation of petitioners' First Amendment rights. See, *Organization For A Better Austin v. Keefe, supra.*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1960), this Court rejected, on First Amendment grounds, a claim that concerted efforts to secure legislation that would result in the destruction of a competitive business violated Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2. This Court stated that even if this conduct might otherwise violate the Sherman Act, the Act should not be construed so as to infringe upon First Amendment rights:

> Secondly, and of at least equal significance, such a construction of the Sherman Act would raise impor-

15. The Superior Court held that the urging of a boycott violated Section 766 of the Restatement of Torts as adopted by the Supreme Court of Pennsylvania in *Birl v. Philadelphia Electric Co.*, 402 Pa. 297, 167 A. 2d 472 (1960).

> tant constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. *Id.* at 137-138.

Similarly in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), this Court construed Alabama's defamation law so as to avoid a chilling effect upon First Amendment rights.

In *Buckley v. Valeo*, 424 U. S. 1, 22 (1976), this Court held that "like minded persons" must be able to "pool their resources in furtherance of common political goals." Conversely people holding similar beliefs should be able to withhold their resources for political purposes. By urging persons to boycott the Gallery and by taking that stand in the company of other "like minded persons", they further a common political goal and "amplify . . . the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Id.* at 22.

The Superior Court also upheld the finding of the Common Pleas Court that picketing which urged the boycott was for an unlawful purpose because it was aimed at "interfering with the Commonwealth's public policy" which promoted the building of the Gallery. State policy cannot be used as a justification for suppressing the speech component of picketing where the result sought by the picketing is lawful. To hold otherwise would prevent citizens from expressing opposition to existing state policies through picketing and speech.

Here, the result which the picketers advocate, the nondiscriminatory distribution of city and federal funds, is not contrary to any clearly defined state policy.[16]

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16. Similarly, the Superior Court's conclusory holding that the picketing was for "extortion" and therefore could be enjoined under the unlawful purpose doctrine was legally incorrect and insufficient

C. The Impermissible Prior Restraint on Free Expression

The Superior Court's order, upholds an injunction against pure speech anywhere in the City of Philadelphia urging a boycott of the Gallery, (in addition to picketing), which constitutes an impermissible prior restraint under the First Amendment and is in direct conflict with this Court's holding in *Organization For A Better Austin v. Keefe, supra.* Under this doctrine this Court has held that the First Amendment forbids the issuance of a prior or contemporaneous injunction against speech and requires instead the imposition of a subsequent penalty, whether civil or criminal, on the conduct alleged to be illegal. *Near v. Minnesota,* 283 U. S. 607 (1931). The Superior Court's citation to *Freedman v. Maryland,* 380

16. (Cont'd.)
to justify such a sweeping injunction. This alleged "extortionate" purpose was derived from two leaflets, (P-21, P-22) handed out during two days in the very beginning of the picketing. They rhetorically stated that it "was resolved by the minority and poor citizens of Philadelphia" that the parties responsible for the Gallery "pay back" to the "Black, Spanish-speaking and poor neighborhoods" the amount of "federal funds" that were "earmarked for the Gallery" and make summer jobs available for minorities. The record is clear that no discussions regarding demands for anything ever took place with Rouse, Gimbels or any of the merchants. Petitioners submit that, the trial court's and Superior Court's simple "labelling" of these events without any *legal* analysis, "extortion" and then banning all speech and other protected activity anywhere in the City of Philadelphia has set a precedent that severely conflicts with rights secured under the First Amendment. *Police Dept. v. Mosley, supra* at 101, 102. It also violates the prior restraint doctrine, see *infra* at p. 19. *Near v. Minnesota,* 283 U. S. 607 (1931); *United States v. New York Times,* 403 U. S. 713 (1971).

U. S. 51 (1965) is misplaced as this Court has treated "obscenity" separately from other areas of "pure" speech:

> *Freedman v. Maryland*, 380 U. S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that obscenity is not protected by the freedoms of speech and press.

United States v. New York Times, 403 U. S. 713, 725 (1971), (Brennan, J., concurring).

This Court has clearly recognized that judicially imposed, as well as other types of prior restraints on pure speech or press, violate the First Amendment. *Near v. Minnesota, supra; Organization For A Better Austin v. Keefe, supra.*[17] The Superior Court's upholding the judicially imposed injunction of the "pure" speech aspects of this case is in direct conflict with these cases.

D. The Prohibition of All Speech and Other Protected Activity Based on the Protestors' Conduct

The Superior Court held that the conduct of petitioners justified enjoining all First Amendment activity in support of a boycott of the Gallery. This is in conflict with previous holdings of this Court. Although the Common Pleas Court found that some of the conduct of the demonstrators was "improper, illegal and in violation of this Court's order", Appendix at p. A88, the record shows virtually no violence or threats of violence which would justify the enjoining of all speech and First Amendment activity in the City of Philadelphia in furtherance of a boy-

---

17. The exceptions set forth in *Near* clearly do not apply to the speech in the instant case.

cott of the Gallery.[18] "Free speech in the future cannot be forfeited because of dissociated acts of past violence." *Milkwagon Drivers Union of Chicago v. Meadowmoor Dairies,* 312 U. S. 287, 296 (1941). See, *Machesky v. Bizell, supra.*

The violence that existed in *Milkwagon Drivers Union v. Meadowmoor Dairies* cannot be even remotely compared to the conduct of the protestors in this case. Although the record does indicate isolated evidence of misconduct on the part of some protestors, the Common Pleas Court did not find that the protestors had engaged in a pattern of violent activities.[19]

Petitioners do not dispute that the Court has the power to impose time, place and manner regulations on the activities of the protestors. They do not dispute that mass picketing and improper conduct can be enjoined. However, the Superior Court's decision upholding the enjoining of all activity in the City of Philadelphia in support of a boycott of the Gallery based on isolated incidents of misconduct clearly "overshoots the mark" and infringes

18. The Common Pleas Court enjoined all activity urging the boycott of the Gallery because it was an unlawful boycott. The "Supplemental Opinion" makes this clear. Appendix at p. A111. If the Common Pleas Court had prohibited all First Amendment activity because of the conduct, the supplemental opinion would never have been written. The supplemental opinion defines the areas where picketing can take place based in part on the conduct of the protestors.

19. The Common Pleas Court ordered the Philadelphia Police Department to assist in monitoring the activities at the Gallery during the entire period in which the picketing took place. These reports (D-21, D-87), show that for the period that picketing took place, there was no "pattern of violent abusive behavior," Appendix p. A14. During 45 of the 65 days, the reports showed there were no incidents, or any complaints of any nature by anyone including Rouse, RDA, Gimbels or the merchants in the Gallery.

on rights clearly protected by the First Amendment to the United States Constitution. *Machesky v. Bizell, supra,* at 290.

E. The Overbreadth of the Injunction Order

Petitioners have stressed throughout this Petition that the Superior Court's order affirming an injunction prohibiting all speech and other activity in support of a boycott anywhere in the City of Philadelphia is unconstitutionally overbroad. By prohibiting *all* activity, both protected and unprotected activity, the court abridged fundamental guarantees in the full dissemination of public expression on public issues. *Coates v. Cincinnati,* 402 U. S. 611 (1971).

This Court has consistently held that:

> An Order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Shelton v. Tucker,* 364 U. S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed. 2d 231 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll v. President & Com'rs of Princess Ann, 393 U. S. 175, 183, 184 (1968). See, *Police Dept. of Chicago v. Mosley, supra* at 101, 102.

The injunction order issued on February 28, 1980 clearly does not meet that test.

CONCLUSION

For each of the foregoing reasons, petitioners respectfully submit that this Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

80-477

No.

IN THE

Supreme Court of the United States

October Term, 1980

AD HOC '78, T. MILTON STREET,

Petitioners,

v.

ROUSE PHILADELPHIA INC.; REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA; GIMBEL BROTHERS, INC.; and the GIMBEL BROTHERS REALTY CORPORATION,

Respondents.

On Writ of Certiorari to the Superior Court of Pennsylvania

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix.

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA AS CORRECTED.*

IN THE
SUPERIOR COURT OF PENNSYLVANIA

Nos. 380, 390 & 444, OCTOBER TERM, 1979

J. 24/1979

ROUSE PHILADELPHIA INC.
and
REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,
Plaintiffs,

and

GIMBEL BROTHERS, INC.
and
GIMBEL BROTHERS REALTY CORP.,
Intervening Plaintiffs,

v.

AD HOC '78
and
T. MILTON STREET AS AN INDIVIDUAL AND AS A REPRESENTATIVE OF AD HOC '78 THE UNINCORPORATED ASSOCIATION OF PERSONS ACTING IN CONCERT TO BLOCK INGRESS TO AND EGRESS FROM THE GALLERY AT MARKET EAST
and

* Incorporating corrections contained in letter from Prothonotary dated January 3, 1980.

JOHN DOE AND JANE DOE
and
ALL OTHER PERSONS ACTING IN CONCERT WITH THE NAMED PARTICIPANTS OR OTHERWISE PARTICIPATING IN THEIR AID,
Appellants

APPEALS FROM THE ORDERS OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, AUGUST TERM, 1978, NO. 4145, GRANTING A PRELIMINARY INJUNCTION AND HOLDING T. MILTON STREET IN CIVIL CONTEMPT OF COURT.

BEFORE: VAN DER VOORT, WATKINS and LIPEZ, JJ.

Opinion by Watkins, J.

(Filed December 28, 1979)

This case comes to us on appeal from the Court of Common Pleas of Philadelphia County, Civil Division, and involves defendant's appeal from an Order of the court below holding him in civil contempt of court. Defendant was also fined Five Thousand ($5,000.00) Dollars which fine was made payable to the City of Philadelphia within six (6) months.

On August 25, 1978, the defendant, T. Milton Street, and a large group of persons estimated to be from three to five thousand (3000 to 5000) strong, massed at various locations in and around the entrances to a downtown shopping mall in Center City Philadelphia known as The Gallery. They also converged on Gimbels Department Store located in the same area. Ingress and egress to

both The Gallery and Gimbels was rendered difficult and, at times, impossible, by the group's activities.

The defendant and three to five hundred (300 to 500) of the demonstrators then entered The Gallery and marched throughout the mall shouting in loud voices and bringing business therein to a virtual standstill. The defendant spoke to the throng with the aid of sound amplification equipment and urged a boycott of the business in the mall.

A temporary restraining order was promulgated by the court below on August 26, 1978, and on January 31, 1979, the court below entered an order enjoining the defendant and the persons acting in concert with him from "picketing, handbilling, speechmaking, demonstrating, and boycotting inside or outside The Gallery or Gimbels . . ." The court defined the area from which defendants were enjoined from engaging in the aforesaid activities as "the public areas therein [The Gallery and Gimbels], or any of the three colonnades located outside the entrance to Gimbels, or the exterior courtyard area, or the sidewalk which forms the immediate perimeter surrounding The Gallery, Gimbels and Strawbridge Store."

On February 22, 1979, the defendant and thirty-seven (37) other persons were arrested at The Gallery for allegedly violating the January 31, 1979 injunction decree. A hearing was then held at which witnesses testified that: Street and two hundred and fifty (250) to three hundred (300) people had congregated on the northeast corner of 10th and Market Streets in Philadelphia, in front of The Gallery and Gimbels; they also had congregated on the sidewalk and in the colonnades area of the mall; the group shouted and blocked the entrance to The Gallery and Gimbels; because they stood close together they were successful in preventing people from entering the stores; that during the incident members of the defendant's group

chanted and shouted "boycott" to persons attempting to enter The Gallery; that a police officer, who had been empowered to enforce the court order enjoining the demonstration gave the defendant Street and his attorney copies of the January 31, 1979 order; that an officer then read the court order to the group using sound amplification equipment but the group continued to shout and chant "boycott" as the order was read to them; and that after giving the group five minutes to disburse the police arrested defendant Street and thirty-seven (37) of his followers. At the hearing defendant Street was given the opportunity to address the court and informed the court that despite the court order he intended "to go back to The Gallery tomorrow".

On February 23, 1979, defendant Street went to The Gallery again and led a group of demonstrators onto the northeast corner of 10th and Market Streets. After being notified of the defendant's actions the court ordered the arrest of persons violating the January 31, 1979 Order. Street was one of the persons arrested. A hearing was held at 1:30 P. M. on February 23, 1979. Testimony adduced at the hearing revealed that at 11:20 A. M., the defendant led a group of thirty-five (35) protestors to the northwest corner of 10th and Market Streets then crossed the intersection. The group was shouting "boycott, boycott" throughout the incident. As the police attempted to read the court order of January 31, 1979 to them, the group marched east on the north side of Market Street for a distance of approximately twenty (20) feet then turned around and marched back to the northeast corner. This area lies in front of The Gallery. The defendant then led his group to a SEPTA boarding island which runs east to west in the 900 block of Market Street on the north side and is about twenty (20) feet from the sidewalk. During this period the group continued to chant "boycott,

boycott, boycott The Gallery", which chanting was clearly audible to persons located at the entrance to and on the sidewalk in front of The Gallery. At this point defendant and his followers were arrested.

After the hearing, the defendant was found in civil contempt of court and was committed for ninety (90) days, conditioned upon his right to purge himself of the contempt by assuring the court that he would, in the future, abide by the court order until such order was vacated or stayed. He was also fined Five Thousand ($5,000) Dollars. On February 26, 1979, Street filed an appeal to this Court.

Defendant's first argument is that the court order prohibiting the "picketing, handbilling, speechmaking, demonstrating and boycotting of The Gallery" constituted an unconstitutional violation of defendant's First Amendment rights of freedom of speech and expression. Defendant's brief states at length defendant's belief that certain federal monies used in the construction of the downtown shopping mall should have been used instead to provide for low-income housing for residents of North Central Philadelphia. Defendant also claims that his protest was justifiable because he was protesting the fact that only one business in the mall was black owned. Defendant claims that since The Gallery is owned by The Redevelopment Authority of Philadelphia (RDA) that his boycott was one of a public building. However, the RDA leased the mall to Rouse Corporation for ninety-nine (99) years and Rouse, in turn, rents individual space within the mall to ninety-four (94) private owners. Thus, it is apparent that The Gallery is indeed comprised of ninety-four (94) private businesses and boycotting or picketing of it constitutes the boycotting or picketing of private business. Gimbels and Strawbridge and Clothier are private businesses and own the building adjacent to the mall in

fee simple. Under such circumstances we find that the demonstrations in question were clearly directed at private businesses.

Defendant also argues that the court order was not lawful because the objective of the boycott was "to communicate a message to government regarding the expenditure of public monies". At the various hearings held on this matter it was shown that: the demonstrators shouted and chanted so loudly that normal conversation was impossible anywhere in the vicinity; that the group occupied virtually all of the walkways, stairs, and escalators in The Gallery; that the demonstrators carried umbrellas and signs which they brandished in a vigorous fashion; that a group of the demonstrators sat down and sprawled in the walkways of The Gallery and in the "Market Fair" area of the mall which is an area containing approximately twenty (20) fast food restaurants in the western end of the mall; that when so situated they listened to and gave speeches over amplifying equipment and stood on tables in the restaurants thereby denying patrons of ingress and egress to the area; that as a result of this activity shops in the mall closed, patrons left the area and business in the mall and other stores was brought to a virtual standstill. It was also shown that on certain occasions during the demonstration several demonstrators had entered a McDonald's restaurant in the mall and had told patrons that the food was horsemeat and had maggots in it. At a bakery in the mall (Tiffany's) disparaging remarks about the quality of food were also made to the store's patrons and one demonstrator stuck her finger in her nose and then touched the produce. Several demonstrators had engaged in violent incidents during the picketing. One demonstrator, a Terrence Potter, had tripped the owner of the bakery during a demonstration. A group of demonstrators then gathered in front of the bakery and shouted

obscene comments and racial slurs at the owner. Potter had also threatened to beat up another merchant in the mall. Another demonstrator, Harry Miller, had threatened to break a merchant's jaw. A group of demonstrators also threatened an elderly female patron of the mall telling her to get out of there "while she could still walk". The demonstrators also ignited a number of fires throughout the mall by igniting the refuse in trash receptacles located throughout the mall. It was also proven that Street had forged a copy of the court order of October 6, 1978 and had distributed copies of the forged order throughout the throng. The forged document distorted the court order so as to convey the impression that it was leafletting material. Street and other demonstrators had given several speeches in which they stated that the purpose of the demonstration was to bankrupt merchants in The Gallery and Gimbels. They also demanded "reparations" from Rouse, Gimbels and the other merchants. They demanded that appellees pay money to black, Spanish-speaking and poor white neighborhoods as "reparations" for the money spent by the Redevelopment Authority on the mall.

Appellant's contention that he did not violate the January 31, 1979 order of court is patently frivolous. Street claims that by moving the demonstration from The Gallery and Gimbels to the medial strip of Market Street, about twenty feet (20) away from the proscribed area, he complied with the court order. On February 22, 1979, Street and his followers picketed and demonstrated on the sidewalks outside The Gallery, Gimbels and Strawbridge and Clothier in direct defiance of the court order. The fact that they later moved to a location twenty (20) feet away from the sidewalk does not alter the fact that they directly violated the order by demonstrating on the sidewalk outside The Gallery. In fact, Street had stated in open court that he intended to go back to The Gallery

despite the order. To argue now that he was not aware of the scope of the court order and did not knowingly violate it extends the imagination to incredible limits. We find that Street and his followers did indeed violate the court order of January 31, 1979 on February 22 and February 23, 1979.

Appellant also contends that the court order was unconstitutional because it was overly broad and because it violated appellant's right to freedom of expression. The value to an open society derived from the free flow of ideas is self-evident. For that reason courts have been loathe to sanction any measure which infringes upon a person's right to communicate his ideas. Pure speech therefore is a right which is to be zealously preserved in our society. However, as a person's activities move away from *pure speech* and into the area of expressive *conduct* they require less constitutional protection. As the mode of expression moves from the *printed page* or from *pure speech* to the commission of public *acts* the scope of permissible regulation of such expression increases. See *U. S. v. O'Brien*, 391 U. S. 367, 88 S. Ct. 1673, 20 L. ed. 2d 672 (1968); *Commonwealth v. Winkleman*, 230 Pa. Superior Ct. 265, 326 A. 2d 496 (1974). It should be noted that in our case the very purpose of the court order was not to limit the *expression* of the *ideas* appellants were attempting to communicate but was to limit the *conduct* by which the appellants chose to communicate their ideas. It is apparent that in a highly technological, civilized society a person or group of persons cannot justify participation in any type of conduct, without any limits at all, merely because they allege that their conduct has a higher, symbolic purpose which, they allege, brings it within the ambit of protection afforded to free speech. The closing of private business by blocking the entrances thereto with the avowed purpose of bankrupting those businesses, loud

abusive language including the use of obscenities and racial slurs, physical intimidation of patrons and store owners, and the setting afire of trash receptacles in a densely populated, downtown, commercial area are all activities which cannot be justified by the appellants' claims that they did these things in order to protest the allocation of government funds to one areas rather than to another. Certainly neither the businesses in The Gallery nor their owners have the power to direct the city to allocate more funds to other areas. Nor can they effectively bring about the ownership of more businesses by blacks. What appellants seem to be saying here is: "if we cannot obtain government funding for our projects then we will destroy those projects which do receive such funding", and "if members of our racial group do not own as many businesses as we think they should own then we will bankrupt businesses owned by others". Appellants then clothe their attempts to destroy the businesses and other governmental projects under the guise of free speech. Of course, appellants have every right to lobby for the benefits of government largesse. However, threatening to do harm to third parties is not a legitimate means of expressing their desire for a greater share of government monies. As the court below pointed out:

> "The slaughter of 11 athletes at Munich as a supposed symbolic and political protest was certainly murder as to the men killed and was by any civilized standard an unacceptable barbarism. In the lesser degree (and absent personal violence) the slaughter of 96 private businesses as a supposed symbolic protest against government conduct is an unacceptable assault upon 5th and 14th Amendment rights to engage in and conduct a business, to work for a livelihood and to hold and use private property."

The court went on to classify appellants' activities as a form of "scapegoat boycotting" which it defined as that boycotting which:

> ". . . urges concerted refusal to have business relationships with a 'target' consisting of a limited number of persons, for the purpose of protesting against and symbolizing protest against actions and conduct of third parties, although the 'target' has no relationship to or involvement in or any control over or power to affect the primary disputes between the protestors and third parties. As to the 'target' the sole purpose of the boycott is to cause damage, injury and destruction for symbolic purposes. In a true scapegoat boycott the 'target' has no power or authority to force concessions from third parties. In a true scapegoat boycott there is no real or bona fide dispute, primary or secondary, between the 'target' and the boycotter."

As discussed above the "targets" of appellant's boycott have no power to alter the present formulas for the distribution of government largesse throughout the City of Philadelphia. Therefore, there is no real dispute between the protestors and the merchants in The Gallery, Gimbels or Strawbridge and Clothier. Unlike the "sit-in" demonstration cases which arose out of "sit-ins" in lunch counters in the South during the 1950's and 1960's the "targets" in our case are not enforcing any discriminatory laws, do not refuse to allow persons to patronize their establishments nor refuse employment to anyone because of racial, ethnic, or religious differences. Thus, this case is readily distinguishable from the sit-in cases such as *Brown v. Louisiana*, 383 U. S. 131, 86 S. Ct. 719, 15 L. ed. 2d 637 (1966) and *U. S. v. Miller*, 367 F. 2d 72 (2d Cir. 1966) cert. denied at 386 U. S. 911, cited by appellant. The fact that blacks do not own more businesses in The

Gallery than they do has nothing to do with any racially discriminatory laws nor, more importantly, with any actions of the "target". For these reasons we do indeed find that the "targets" in our case were the victims of so-called "scapegoat boycotting". The question remains, however, as to whether "scapegoat boycotts" are illegal.

In a free society no one may force another to refrain from patronizing a particular, lawfully administered business establishment by unlawful means. Certainly a person or group of persons may attempt to convince others to purchase a certain product or to refrain from purchasing certain products whatever their reason. The question is to what extent may one go in attempting to convince others not to patronize certain establishments? Put another way the question is: "To what extent may the state go in limiting a group's boycott of private business?". The answer is that picketing (which involves actions as well as speech and therefore is subject to more regulation than pure speech) in order to enforce a boycott which is conducted for a person contrary to law is unlawful in itself and may be restrained. *Hughes v. Superior Ct.*, 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985 (1950); *1621, Inc. v. Wilson*, 402 Pa. 94, 166 A. 2d 271 (1960). In *Hughes v. Superior Ct.*, supra, the court stated that:

> "It has been amply recognized that picketing, not being the equivalent of free speech as a matter of fact is not its legal equivalent. Picketing is not beyond the control of a state if the *manner* in which the picketing is conducted or the *purpose* for which it seeks to effectuate gives ground for its disallowance . . . We cannot construe the due process clause as precluding California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would

support such policy. See *Giboney v. Empire Storage & Ice Co.*, supra." (Emphasis added) 339 U. S. at 465-66.

In *Hughes, supra,* a group of protestors had conducted boycotts of a certain business establishment which allegedly did not employ blacks in the same ratio as the business's clientele. In holding that racially-oriented employment practices were contrary to the State of California's public policy the Court upheld the state court's ban on the systematic picketing of the establishment which *picketing* supported the proscribed practice. In *American Radio Association v. Mobile Steamship Association,* 419 U. S. 215, 95 S. Ct. 409, 42 L. Ed. 2d 399 (1974), members of a maritime union peacefully picketed and distributed leaflets at a public dock which urged people to "Ship American". Unlike our situation in the instant case the demonstrators were peaceful and nonviolent. Upon petition of certain third parties the state court enjoined all of the demonstrators' activities at the dock which was owned by the State of Alabama. The Supreme Court upheld the trial court's ban on the picketing reasoning that the demonstrators' activities were done, in part, with the intention of interfering with business at the state dock. Since tortious interference with business at the public dock was unlawful the picketing on the dock was unlawful and its ban was upheld.

In our case, as in *American Radio Association,* supra, the protestors conduct constituted a tortious interference with business relations. One has a right to pursue his business relations free from interference on the part of other persons except where such interference is justified or constitutes the exercise of an absolute right. *Birl v. Phila. Electric Co.,* 402 Pa. 297, 167 A. 2d 472 (1960); *Restatement, Torts, Section 766.* As discussed above, the

right to picket is not absolute because it involves actions as opposed to pure speech. Since the 'targets' of the picketing and boycott were "scapegoats" because they did not possess the power to grant *the* concessions demanded by the demonstrators we find that the injunction issued by the court below which restrained the picketing and boycotting of The Gallery, Gimbels, and the Strawbridge store was lawful. In addition the court below reasoned that the protestors' activities directed against the "targets" coupled with their demands that the "targets" pay "reparations" to black and other minorities constituted an act of extortion. The court also found that the activities of appellant and his followers were aimed at interfering with the effectuation of the Commonwealth's public policy to promote the public health, safety and welfare of its citizens and to eliminate blighted areas. For all of these reasons appellants' activities in picketing the proscribed areas were conducted at least in part for purposes contrary to state law, i.e. extortion, tortious interference with business relations, and interference with the Commonwealth's public policy of promoting the health, safety and welfare of its citizens.

Appellant argues that most of the cases in which picketing has been enjoined were cases involving picketing by labor unions and attempts to distinguish his situation on that basis. We can find no precedent (nor is any such precedent cited by appellant) which holds that non-labor picketing enjoys greater constitutional protection than labor picketing. We note that *Hughes v. Superior Court*, supra, is a case in which the Supreme Court upheld an injunction against non-labor picketing. It is therefore, apparent that non-labor picketing may be enjoined if it is done, for an unlawful purpose and an injunction is proper if only part of the demonstrators objects in picketing is unlawful. *Anchorage, Inc. v. Local 301, A. F. L.*, 383 Pa.

547, 119 A. 2d 199 (1956). We, therefore, reject appellant's argument and hold that the court below acted properly in enjoining the picketing of The Gallery, Gimbels and Strawbridge and Clothier. The appellants' activities in yelling obscenities into the ears of patrons who refused to submit to appellants' directives to refrain from patronizing the "targets", the setting of fires in the trash receptacles in the indoor mall, the use of amplification equipment to broadcast obscenities at passersby, the threats to set afire certain stores, the extending of their arms in order to block people from entering the stores, the continued trespass on private property (Gimbels) and the directing of racial slurs to white and to black employees of the area who refused to join in their activities constitutes conduct which is violent, abusive and illegal. Appellant Street's avowed intention of disobeying the court order coupled with the record of the protestors' activities during their demonstrations certainly justified the court's order enjoining any future demonstrations at the target areas. Because the purpose of the appellants' activities was unlawful and because the record indicates a pattern of violent, abusive behaviour during the demonstrations we hold that the court below was justified in enjoining any such future demonstrations.

Appellant's argument that the court order constituted an unlawful prior restraint on free speech is also devoid of merit. In the instant case a full and complete hearing had been held and the conduct enjoined, although expressive conduct and therefore afforded some First Amendment protection, was correctly found to be unlawful. Thus, appellant has had the benefit of a full and complete hearing prior to the entry of any order proscribing his conduct. As such the court's order is not an impermissible prior restraint on free speech. See *Freedman v. Maryland*, 380 U. S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1964).

Appellant's argument that the January 31, 1979 order is overbroad is also meritless. Since the picketing in our case was done for an unlawful purpose and in a violent, unlawful manner which in and of itself may have constituted a breach of the peace we hold that the court below acted correctly when it prohibited all such activities at the target areas. Nor is the order vague as claimed by appellant. A reading of the order clearly indicates that it specifically enjoined certain activities (picketing, handbilling, etc.) in certain specific areas.[1] Only an illiterate could fail to understand its scope.

Appellant argues that T. Milton Street was not obligated to obey the January 31, 1979 order. This argument is also meritless. Parties must obey a preliminary injunction, even if invalid, if the order is entered by a court with jurisdiction over the subject matter of the order and the parties thereto unless the order is vacated or reversed. *Horne v. Internation Union of Operating Engineers,* 250 Pa. Superior Ct. 145, 378 A. 2d 868 (1977). The January 31, 1979 order was neither vacated nor reversed and we have held that the order was properly entered. T. Milton Street conspicuously violated the January 31, 1979 order on February 22, 1979 and February 23, 1979. In fact he announced in open court that he

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"1. Defendants, T. Milton Street and Ad Hoc '78, together with their agents, servants and those acting in their interest or at their direction, are enjoined and restrained preliminarily, until final hearing, and therafter until further order of this court, from picketing, handbilling, speechmaking, demonstrating, and boycotting inside or outside The Gallery or Gimbels, including the public areas therein, or on any of the collonnades located outside the entrance to Gimbels, or the exterior courtyard area, or the sidewalk which forms the immediate perimeter surrounding The Gallery, Gimbels and Strawbridge' stores."

would not abide by the order. Therefore, it is readily apparent that the order applied to T. Milton Street and that he violated said order.

It is axiomatic that courts have always possessed the inherent power to enforce their orders and decrees by imposing sanctions for failure to comply with said orders. *In re: Martorano,* 464 Pa. 66, 346 A. 2d 22 (1975); *Rule 1529(c), Pennsylvania Rules of Civil Procedure.* Contempt of court is divided into two classes: (1) civil contempt and (2) criminal contempt, (a) direct contempt and (b) indirect contempt. *Brocker v. Brocker,* 429 Pa. 513, 241 A. 2d 336 (1968). Directed criminal contempt involves those contumacious acts committed in the presence of the court. *Knaus v. Knaus,* 387 Pa. 370, 127 A. 2d 669 (1956). The distinction between criminal contempt and indirect civil contempt lies in the judicial response to the contumacious acts and the judicial responses are classified according to the dominant purpose of the court in issuing the order. If the dominant purpose of the court is to punish an offender for past contumacious acts in disobedience to a court directive then the contempt is criminal. If the purpose of the court is to coerce the contemnor to comply with the court directive then the contempt is civil contempt. Several factors indicative of civil contempt are:

> (1) where the complainant is a private person as opposed to the government or a governmental agency; (2) where the proceeding is entitled in the original injunction action and filed as a continuation thereof as opposed to a separate and independent action; (3) where holding the defendant in contempt affords relief to a private party; (4) where the relief requested is primarily for the benefit of the complainant; and (5) where the acts of contempt complained

> of are primarily civil in character and do not of themselves constitute crimes or conduct by the defendant so contumacious that the court is impelled to act on its own motion."

Philadelphia Marine Trade Association v. International Longshoreman's Association, 392 Pa. 500, 140 A. 2d 814 (1958). It is apparent that the contempt in the instant case was indirect civil contempt. The complainant in the case is the Rouse Corporation, a private entity. The matter consisted of a series of hearings and court orders. The contempt proceedings were entitled in the original injunction action and filed as a continuation of said action. The relief requested was solely for the benefit of private parties, namely, Rouse, The Gallery merchants, Gimbels and Strawbridge and Clothier to protect them from unlawful interference with their businesses. Holding the defendant in contempt would afford relief to the private parties by preventing the unlawful picketing of their establishments. Finally, the acts committed by defendant Street were not by their nature so contumacious that the court was compelled to find Street in contempt on its own motion (although certain of the acts committed by other demonstrators during the incidents may very well have been criminal in nature). Thus, it is clear that the contempt in our case was civil in nature. The fact that the court ordered the Sheriff's Office to enforce the order does not change the nature of the contempt.

Subjugation to confinement for civil contempt must provide a condition with which the contemnor is capable of complying and which has the effect of purging the contemnor of the contempt if he complies with it. *Simmons v. Simmons,* 232 Pa. Superior Ct. 365, 335 A. 2dn 764 (1975). The court may, however, impose an unconditional fine upon a contemnor which may be payable to the

United States or the Commonwealth or to the County, or to the private parties who have been injured. *Brocker v. Brocker,* supra; *U. S. V. U. M. W.,* 330 U. S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947). An unconditional fine can serve two purposes: (1) to punish violators or (2) to deter future or continued violations of the law. *Mastrangelo v. Buckley,* 433 Pa. 352, 250 A. 2d 447 (1969). The deterrence of continuous or future violations of a court order is a legitimate interest to be served by the levy of an unconditional fine. In this case the fine was made payable to the City of Philadelphia which had been forced to spend upwards of $1,400,000 in attempting to ensure compliance with the court order. Of this amount approximately $400,000 represents the overtime costs to police and Sheriff's deputies which otherwise would not have been incurred. Such costs were necessarily incurred because of the potentially violent situations created by the protestors. The court below made specific findings to that effect. Where an unconditional fine is imposed which is made payable to the governmental unit required to enforce the court order and to encourage future compliance to the benefit of the aggrieved private parties it should be sustained. *N. L. R. B. v. J. P. Stevens, Co., Inc.,* 563 F. 2d 8 (2d Cir. 1977), cert. denied 98 S. Ct. 1240 in 434 U. S. 1064. For these reasons we hold that the court below acted properly in finding appellant in civil contempt of court and that the $5,000 fine imposed upon him was lawful.

Appellant's final contention is that the court below failed to provide him with the required due process guarantees before finding him in contempt of court. Specifically, appellant argues that before he could be held in indirect civil contempt a rule to show cause why an attachment should not issue, an answer thereto, a hearing, a rule absolute, a hearing on the contempt citation, and an

adjudication of contempt had to be held citing *Altemose Construction Co. v. Building and Trades Council of Phila.*, 449 Pa. 194, 296 A. 2d 504 (1972). In *Altemose*, supra the contempt proceedings were initiated for disobedience of a preliminary injunction entered ex parte. The error in that case was the lack of opportunity for appellants to be heard on the propriety of the court order for which they were held in contempt prior to the initiation of contempt proceedings. However, the above-mentioned multi-step contempt procedure is clearly not applicable to a situation in which the attachment and contempt proceedings are predicated upon the violation of an order or decree which has been entered *after* a full hearing and which have been served upon the contemnor. These initial procedures are obviously redundant when the contemnor is already in custody by attachment pursuant to *Pennsylvania Rule of Civil Procedure 1529 (c)*, as was the situation in the instant case. See *Commonwealth ex rel. Magaziner v. Magaziner*, 434 Pa. 1, 253 A. 2d 263 (1969). We hold that contempt proceedings which are predicated upon the violation of an order which has been served on the contemnor and entered after a full hearing on the merits thereof may be commenced by attachment, and due process requires no more than notice of the violations alleged and opportunity for explanation and defense. *Riccobene Appeal*, 439 Pa. 404, 268 A. 2d 104 (1970). In the instant case appellant was given the opportunity to be heard prior to the issuance of the order and even if we were to hold that the *Altemose* multi-step procedure applied to this situation we would hold that appellant had been provided with the procedural safeguards guaranteed therein as the court below conducted three hearings at which appellant had the opportunity to be heard prior to holding appellant in contempt of court.

Appellant's argument that insufficient evidence was adduced at the hearing below in order to find him in contempt of court is fatuous. He claims that his activities conducted on the medial strip outside of The Gallery were not a violation of the court order. Whether or not the order proscribed the boycott activity on the medial strip is irrelevant because sufficient evidence was produced to show that he conducted the boycott activities in violation of the January 31, 1979 order immediately outside The Gallery and Gimbels on the northeast corner of 10th and Market Streets, in Philadelphia, prior to moving to the medial strip. This clearly was the area at which such activities had been enjoined. Therefore, we hold that sufficient evidence was adduced at the hearing held by the court below from which appellant could be adjudged to be in violation of the January 31, 1979 order.

Orders affirmed.

OPINIONS AND ORDERS OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, TRIAL DIVISION.

IN THE
COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
TRIAL DIVISION

AUGUST TERM, 1978
No. 4145

ROUSE PHILADELPHIA INC.

and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,

Plaintiffs,

and

GIMBEL BROTHERS, INC.

and

GIMBEL BROTHERS REALTY CORP.,

Intervening plaintiffs.

v.

AD HOC '78

and

T. MILTON STREET, AS AN INDIVIDUAL AND AS A REPRESENTATIVE OF AD HOC '78, THE UNINCORPORATED ASSOCIATION OF PERSONS ACTING IN CONCERT TO BLOCK INGRESS TO AND EGRESS FROM THE GALLERY AT MARKET EAST

and

JOHN DOE AND JANE DOE

and

ALL OTHER PERSONS ACTING IN CONCERT WITH THE NAMED PARTICIPANTS OR OTHERWISE PARTICIPATING IN THEIR AID,

Defendants

KREMER, J.

Dated: January 31st, 1979

Opinion and Supplemental Opinion
Sur Motion for Preliminary Injunction

INTRODUCTION

We have before us for consideration (as the primary question, as we see it) whether or not a minority and historically disadvantaged group with what it conceives to be a correct and justified message and protest, may select as a target of boycott messages third-party non-government individuals with whom there are no real or bona fide disputes for the purposes of highlighting protest against the conduct of governmental agencies. The question otherwise phrased is whether the defendants can engage in "scapegoat boycotting" and "scapegoat picketing" for the avowed purpose of injuring and destroying a complex of innocent and uninvolved businesses for demonstrative and symbolic purposes.

We have been cautious not to put the issue as a loaded question because our answer rests upon the facts and factual nuances as we have found them. The targets of the defendants' boycotting, to which we refer, are Rouse, Gimbels, Strawbridges and the 94 business entities presently leasing space and operating businesses in The Gallery. We refer to these businesses as "innocent"

because they are not really guilty of any wrongdoing by any possible stretch or twist of argumentation or imagination. These businesses have not engaged in or fostered any racial discrimination whatsoever; they have not engaged in any conduct antithetical to the interests of the defendants. There is not a scintilla of evidence that these businesses are in any way responsible for any of defendants' grievances or that they could do anything to redress or remedy such grievances. We reject the excusatory suggestions that these businesses are somehow culpable simply because they have lawfully accepted benefits from the government, which could have gone to the boycotters and their communities or for other purposes.

In net effect the defendants say to the plaintiff businesses, we wish to use you as an example to show that some communities have benefited from the expenditure of urban renewal funds while the black [1] communities were getting less than their fair share. This message broadened into general black protest—protest against lack of black business ownership, against inadequate schooling, against alleged police brutality and against an effort to change the City Charter. The integrity of the protest is muddied by the immediacy of Mr. Street's candidacy and campaign for the state legislature. The defendants say, although we do not really have any direct or even indirect conflicts with you, we wish to use you as an example and a scapegoat—as a target for our mixture of social messages and protests. We intend to use you as a focus for our protests. And, if it becomes necessary, we are willing to destroy your businesses as an example of racial discriminations of the past and the failures of the

1. As used in this opinion the reference to "black" will be deemed to comprehend Spanish and poor white communities which are also stated to be represented by the defendants. However, the disputes involved are overwhelmingly ones of black confrontation.

present. The defendants act on the thesis that only by causing anguished cries of financial pain—even from those immediately innocent—can they get the necessary attention from the governmental and economic power structure which is in the sole possession of the white establishment.

A black activist, T. Milton Street, and some other persons and groups have been seeking government (primarily federal) funding for housing redevelopment and community redevelopment in black communities for some period of years. These persons are convinced that they have been given a run-around; that the government funds have been distributed discriminatorily. In order to highlight their complaints against the manner in which the federal, state and city governments have distributed government funds, the defendants selected The Gallery as a target of protest because it represents a highly successful example of an area that has received government funds in the course of urban renewal.

There is no doubt that the defendants raise questions in good faith as to the fairness of the City's area allocations and designations for the use of federal funds for housing purposes. There is substantial and disturbing indication that the black communities may not have been fairly and equally treated, but that question is not before us for consideration or resolution.[2]

In reaching our decision, we have cautioned ourselves that a dominant segment of society has numerous conscious and unconscious techniques for maintaining its ascendancy and the status quo—for resisting and slowing the process of change.

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2. This and related questions are being litigated in the federal court in a matter in which Community Legal Services, Inc., which represents Ad Hoc here, also represents the litigants in that case.

The rights of black citizens to convey messages of protest in an effective and significant manner, in an effort to help correct deep-seated historic inequities are amongst the most important aspects of the First Amendment. Picketing, parading and demonstrating in the streets may sometimes be the only communication and expressive outlets available for the poor and the disadvantaged. Certainly, in a white-dominated society, the defendants have the right to protest against the entrenched results of centuries of discrimination. They have a right to protest for the purpose of highlighting the inequities of the past and the inequities of the present and the threat of continued inequities in the future.

It is important and urgent that all legitimate avenues be kept open for First Amendment expressions of complaint and protest; but we cannot accept the thesis that the protest may take the form of injury to and destruction of innocent and uninvolved third parties for purposes of symbolism. Respect for the First Amendment does not require knee jerk responses which exclude analysis of other rights. We must avoid First Amendment reference as a magical incantation and we must test each case by its particular facts. Scapegoat boycotting for the effective purpose of injuring or destroying a business goat, without even any semblance of real dispute with such business, cannot be permitted. There is a constitutionally protected Fifth and Fourteenth Amendment business right to survive which must be balanced against First Amendment rights to deliver a message to injure and destroy.

The suppression of the dissemination of ideas is the gravest of dangers. Nothing is to be barred from communication be it called treason or heresy. The heresies of today may prove to be the truths of tomorrow, and the treasons of today may prove to be tomorrow's needs for social change. We must be ever vigilant that the voice

we silence is not that of some present-day Galileo. Such high-sounding language is easier to come by when we speak of Galileos. The rights of the poor and the residents of the slums may be in more need of protection. But even the poor and the dispossessed must speak within the boundaries of the law.

There are few eternal verities. Heraclitus recited one that all is change and one cannot step into the same river twice. And Einstein recited another that all of physical reality is relative. In these senses social actions and relations are also in constant motion; man is evolving socially as well as physically. The freedom of man to think and to express himself is crucial to social evolution. It is in the memory of that experience that we owe a maximum loyalty to the First Amendment. Our decision is in keeping with this command.

The slaughter of 11 athletes at Munich as a supposed symbolic and political protest was certainly murder as to the men killed and was by any civilized standard an unacceptable barbarism. In the lesser degree (and absent personal violence) the slaughter of 96 private businesses as a supposed symbolic protest against government conduct is an unacceptable assault upon 5th and 14th Amendment rights to engage in and conduct a business, to work for a livelihood and to hold and use private property. We conclude that when a message progresses in action to militant picketing and boycotting so as to scapegoat private citizens and to convey a false impression that they have been responsible for discrimination or that they have anything to do with the protestors' grievances, then such conduct must be enjoined. Sometimes the law comes down with unequal weight upon disputing parties, particularly where one of the groups is carrying the weight of centuries of discrimination. There is puzzlement as to who shall pay the price—as to how we should struggle to

rectify. Again and again we are impelled to return to the question of whether it can be constitutionally right to use a few members of the white society as a scapegoat to exemplify the accumulated disparities of three centuries. The answer must be in the negative.

We are aware of the fact that persons of great goodwill and of deep social concern must address corrective attention to some of the protest subject matters. We are also aware that in a most real sense the defendants are guilty of counter-scapegoating, rather than scapegoating. That circumstance does not lend excuse to selection of an innocent target for destruction. We cannot accept irrational counter-hatred as an appropriate answer to irrational hatred.

As a trial court we do not have sufficient time for relaxed study and analysis of the theoretical elements of the First Amendment as it relates to boycotting and picketing. We do not bottom our decision on distinctions between speech and conduct or between speech and speech-plus, or on distinctions between coercion and persuasion. *See, e.g.*, "The Invisible Hand and Clenched Fist: Is There a Safe Way To Picket Under The First Amendment?" 26 Hastings Law Journal 167 (Sept. 1974).

We do not rely upon any single concept whether it be of so-called unlawful purpose, or conspiracy, or slander *sub silentio* or improper and unlawful conduct. Our decision is a response to the combination of all of these matters in this case. A felt instinct for fundamental fairness impels us to stop the defendants—they have gone too far and too awry in their otherwise forgivable efforts to be heard effectively. To rule otherwise would be a declaration that the plaintiffs are beyond the protection of the law, that the plaintiffs are to be denied of the due process right of survival.

A boycott cannot be for a lawful purpose when it is designed and intended to, *inter alia*, punish a small group of citizen businessmen for lawfully accepting benefits from City, State or Federal governments. And in this case the benefits result because of long term federal and local programs and planning. The boycott thus seeks to frustrate and defeat crucially significant governmental public welfare programs and policies dealing with problems of urban blight and decay.

The defendants have the right to contend that the urban renewal funds used to correct circumstances of center city blight should more wisely and more fairly be used to correct circumstances of housing blight in North Central Philadelphia. We must bear in mind that it is contended that the very government itself permits and promotes these funds to be discriminatorily allocated to benefit primarily white communities. That is an important and valid message. That is a matter for public disclosure, debate and political action. It is not a matter for indiscriminate injury to and destruction of some other recipients of the benefits of governmental plans and programs as a symbol of protest against the government.

The court has not decided whether the Redevelopment Authority is entitled to injunctive relief. Such determination is unnecessary because the non-governmental plaintiffs are entitled to injunctive relief. In this case there is a dispute between the defendants and the R. D. A. insofar as the R. D. A. is a government agency which the defendants claim is dominated by the governmental authorities and administration which the defendants accuse of discrimination. The utmost caution should be exercised before any court silences criticism of the government or any of its agencies.

In reaching our conclusion we have been mindful of the fact that the present Supreme Court of the United

States may be narrower in the construction of some constitutional protections than our own Supreme Court of Pennsylvania. Therefore, in applying the constitutional protections afforded by the Pennsylvania State Constitution, the state is not bound by narrower federal constructions. That was made clear in the case of *Willing v. Mazzocone,* — Pa. —, 393 A. 2d 1155 (1978). However, if we are correct that we are here concerned with a balance of competing federal constitutional rights, then our state courts are bound by the federal decisions which address the scope of Fifth and Fourteenth Amendment rights of due process as balanced against First Amendment speech protections.

HISTORY OF CASE

The case is before us on plaintiffs' motion for preliminary injunction. There are three plaintiffs. Plaintiff Rouse Philadelphia, Inc. (Rouse) is a Maryland Corporation licensed to do business in Pennsylvania. Rouse is engaged in the operation of an enclosed, four-level shopping mall known as The Gallery located in downtown Philadelphia. It leases places of business within The Gallery from the Redevelopment Authority of Philadelphia and Gimbels, and sub-leases property to approximately ninety-four merchants. Plaintiff Gimbel Brothers, Inc. (Gimbels) is a New York corporation licensed to do business in Pennsylvania. Gimbels owns and operates a large department store which anchors the western end of The Gallery complex. Plaintiff Redevelopment Authority of the City of Philadelphia (RDA) is a non-profit Commonwealth authority, established pursuant to the Urban Redevelopment Law, Act of May 24, 1945, P. L. 991, 35 P. S. 1701 *et seq.* The Redevelopment Authority is authorized, among other things, to exercise the right of eminent domain, to purchase and acquire real estate, to

clear buildings and other improvements therefrom, to enter into agreements with others, to own real estate and convey or lease it to others, all for the purposes of redevelopment of real estate and the elimination of blighted areas. The Redevelopment Authority owns The Gallery and was the developer and general contractor for the construction of The Gallery.

Defendant Ad Hoc '78 (Ad Hoc) is an unincorporated association of community organizations. They are acting to induce the public to boycott the stores in The Gallery and the Gimbels department store. Defendant T. Milton Street is a representative of and chairman of Ad Hoc '78. Defendants John Doe and Jane Doe are names for unidentified members of Ad Hoc or other individuals, who are acting in concert to boycott The Gallery and Gimbels.

This controversy began on August 25, 1978, when approximately three to five thousand persons gathered at 9th and Market Streets at about 1:00 P. M. and engaged in a protest against The Gallery. This demonstration marked the commencement of the defendants' boycott of The Gallery. Various demonstrators, including political representatives, gave speeches on a variety of subjects.

About 500 demonstrators entered The Gallery without interference from the police who were present in large numbers.[3] Inside The Gallery, the protestors paraded in and about and from level to level constantly shouting and singing and chanting on various themes.

The protest inside and outside The Gallery was peaceful. There was no actual violence or threats of violence or destruction of property. However, the demonstration was so massive and noisy and angry-sounding as to neces-

3. The use of large police presence was a reasonable form of governmental conduct consistent with duties to protect persons and property and within the scope of police judgment and discretion.

sarily inspire fears of potential violence. The demonstrators kept shouting they were not going to take it any more. The businesses in The Gallery were brought to a virtual standstill.

Signs were carried relating to police brutality, the charter change, the MOVE situation, absence of any black-owned stores in The Gallery, lack of housing in poor and black neighborhoods, public money being spent on The Gallery and other topics of public concern. Most protest activity took place in the public areas and the courtyards inside and outside The Gallery. The demonstrators continuously conducted themselves in a loud and raucous and militant and bellicose manner. Some of the shouting was done over bullhorns. At various times the demonstrators sat down in the walkways of The Gallery and in the Market Fair area to listen to speeches given over portable amplifying equipment. During such times, egress and ingress to the shops in The Gallery, particularly the Market Fair restaurants, was impeded or blocked by the demonstrators, some of whom sat and stood on the tables (reserved for eating) in Market Fair.

On the evening of August 25, 1978, the plaintiffs petitioned this court (as Emergency Judge) for immediate *ex parte* injunctive relief. The court, having previously received a telephonic request for opportunity to be heard [4] from John Street, Esquire, as attorney for defendants, promptly scheduled a hearing for 9:30 P. M. that evening. The hearing was postponed at the request of the plaintiffs and a hearing was then set for 7:00 A. M. the following Saturday morning. After testimony commenced, by agreement of all parties, this court issued a temporary injunction

4. Opportunity to participate should be given unless it is impossible to serve or notify the opposing parties, *Apple Storage Co., Inc. v. CEPA*, 441 Pa. 309, 314, 272 A. 2d 496 (1971).

enjoining and restraining mass picketing and defining permissible conduct.

August 31, 1978 was set as the date for hearing on the motion for preliminary injunction. Testimony was heard [5] until October 26, 1978. The parties submitted numerous requests for findings of fact and conclusions of law and supporting briefs and supplemental briefs. The last supplemental request for findings was filed on November 27, 1978. Constitutional issues of importance are presented.

Our detailed findings of fact and conclusions of law are appended to this opinion. We have reviewed and considered and passed upon the very extensive requests for findings submitted by each party.

RE. RIGHT TO BOYCOTT

Picketing is a form of both assembly and speech and consequently comes within the protective guarantees of both the First Amendment to the Constitution of the United States and Article I, sec. 7 of the Constitution of the Commonwealth of Pennsylvania: [6] *Thornhill v. Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940); *Carlson v. California,* 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940); *Westinghouse Electric Corp. v. United Electrical Workers,* 353 Pa. 446, 46 A. 2d 16 (1946); *Pennsylvania L. R. Board v. Bartenders Union,* 361 Pa. 246, 64 A. 2d 834 (1949); *Wortex Mills v. Textile Workers U. of A.,* 369 Pa. 359, 85 A. 2d 851 (1952); *1621 Inc. v. Wilson,* 402 Pa. 94, 166 A. 2d 271 (1960). Picketing is a legally protected method of expression when used to enlighten

5. At the request of the Administrative Judge, the Emergency Judge continued to handle the matter.

6. Article I, Section 7 of the Pennsylvania Constitution provides, *inter alia,* that ". . . every citizen may freely speak, write or print on any subject being responsible for the abuse of that liberty."

the public about a dispute or grievance with a business. Although it may incidentally discourage customers from entering or patronizing a store or other business, it still remains as protected expressive conduct: *Moore v. Newell,* 548 F. 2d 671, 672 (6th Cir. 1977).

However, there are special circumstances attendant to picketing which characterize this form of expression as "speech plus" as opposed to "pure speech." Being a hybrid form of speech, picketing does not enjoy the same full measure of First Amendment protection as pure speech and it must be analyzed from a slightly different perspective. "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." [7]

Because picket lines and picketers can so easily induce action regardless of the message being conveyed, courts have been sensitive to the special circumstances attendant to picketing. Although it is protected conduct, picketing is more susceptible to court regulation than other forms of speech. This results from the inherent nature of picketing which generally publicizes grievances and calls for public support to honor the cause. Oftentimes the grievances involve business practices. Therefore, picketing frequently calls into question the property rights of others. Courts are also sensitive to the concomitant constitutionally protected property rights of the targets of picketing. Balancing First Amendment rights of expression and Fifth Amendment property rights (both of which are applicable

7. *International Brotherhood v. Vogt,* 354 U. S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347 (1957); See *Bakery and P. Drivers and Helpers,* 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942); *Carpenters and J. Union v. Ritter's Cafe,* 315 U. S. 722, 62 S. Ct. 807; 86 L. Ed. 1143 (1942).

to the states through the Fourteenth Amendment) sometimes presents a delicate and difficult task. When First Amendment rights have the effect of infringing upon others' property interests, it is necessary to take a critical look at the circumstances. It may be that property damage is incidental to protected expressions. It also is possible that injury to that property is the very purpose of the expressive conduct. When this is the case, that expression may be an unwarranted and unprotected infringement upon others' property rights.

There is no doubt that defendants intend to injure and inflict economic damage upon the plaintiffs' businesses. The plaintiffs argue that this purpose is malicious and unlawful. They argue that this illegal purpose renders what might otherwise be lawful rights of expression unlawful. Under Pennsylvania law an illegal purpose may make peaceful and orderly picketing unlawful. In *Wortex Mills, Inc. v. Textile Workers Union of America, C. I. O.*, 369 Pa. 359, 85 A. 2d 851 (1952), the Pennsylvania Supreme Court was called upon to decide the lawfulness of mass picketing in the context of a labor dispute. The Court held that mass picketing was illegal, and that, where coercion and intimidation and threats accompanied picketing, such picketing was illegal and would be enjoined. The Court noted (at p. 363):

> "Freedom of speech gives no right of intimidation or coercion and no right to damage or injure another's business or property, except where this results indirectly from peaceful and orderly picketing for a purpose which the law regards as legitimate and lawful."

The Court also stated that an unlawful purpose vitiates otherwise lawful picketing (at p. 369):

> *"A State Court may enjoin unlawful picketing or picketing which is conducted in an unlawful manner or for an unlawful purpose. Picketing, if peaceful, orderly and for a legitimate or lawful purpose, is legal and within the protection of the Constitution. However, a State is not required to tolerate in all places and in all circumstances even peaceful picketing by an individual; it is well established that the method or conduct or purpose or objective of the picketing may make even peaceful picketing illegal."*

In *1621, Inc. v. Wilson,* 402 Pa. 94, 166 A. 2d 271 (1960) the Court recognized a right to obtain equitable relief from a boycott that was being conducted for an objective which violated a legitimate, clearly defined law or public policy of the state. The Court refused to enjoin picketing of a taproom by certain unincorporated neighborhood organizations. The picketing continued daily, except Sunday, and included signs such as "Luther King did it why can't we;" "Please do not patronize excess bar;" "We need classrooms not taprooms;" "We can't be bought please don't patronize this bar". The Court stated (at p. 107-8) that the objective of the picketers was to convince passersby,

> ". . . by means of persuasion, not to patronize the establishment so that in time its operation would become uneconomical and appellant would transfer the liquor license to another location, or failing in that, to persuade the appellant to so police his patrons that the most blatant of evils complained of would cease so that the peacefulness and good character of the neighborhood would not be destroyed."

The picketing was deemed lawful since the purpose was to protest against an admitted nuisance in fact. The

court carefully noted, however, that if the objective of the picketing violated a "legitimate, clearly defined law or public policy of the state," it could be prohibited.

The *1621* Court focused critical attention on the objective of the picketing. All picketing, regardless of its purpose, serves to some extent to discourage customers from entering or patronizing a business. In *1621*, the Court found the picketers' effect upon the plaintiff's business to be incidental to their primary objective of protecting their neighborhood against nuisance. It follows then, that a distinction between permissible picketing and impermissible picketing turns on whether the picketers' activity incidentally harms the plaintiff's business in their pursuit of their primary and lawful purpose, or whether the primary purpose is to maliciously injure the plaintiff's business.

The purposes and objectives of the boycott are reflected in the boycott literature, the actions of the demonstrators, and in Mr. Street's testimony.

The defendants accused the city government of policies of racial discrimination with regard to public housing and job opportunities over a period of more than 25 years. They contended that shopping districts and housing should be developed in other communities and asserted that center city development deprived the poor of needed federal rehabilitation funds. They also charged racial discrimination in education for minorities (of failure to keep the schools open).

In the boycott literature the defendants protested that over $25,000,000 of federal monies was spent to build The Gallery and that another $12,000,000 was to be spent for a Gallery II. The defendants protested that there were housing monies expended to enrich center city businessmen and that no money was spent for housing in black and other poor communities—particularly in Mr. Street's

North Philadelphia area. It was urged that businesses who profit from such activity should not be supported.

The boycotters demanded that "the people who planned, built and run The Gallery pay back the full amount of all federal monies, plus interest, to black, spanish-speaking and poor (white) neighborhoods." A demand was also made that "The same people make summer jobs for Black, Spanish-speaking and Poor White youth and also permanent opportunities (spots) for Black and Spanish-Speaking businesses." Mr. Street and the boycotters took the position that because the merchants, Gimbels and Rouse received the benefit from use of federal funds which could have been used for housing, that there was an obligation to pay back funds into black communities; that the merchants pay into an escrow fund which could be established for housing and other social problems in North Philadelphia and other communities. Mr. Street stated that Rouse owed an obligation to address problems experienced by the black community; that Rouse should build or rehabilitate some houses. Although Mr. Street stated that he was not telling Rouse, Gimbels or the merchants what to do, that is not accurate. One of the major boycott demands was that payments be made for benefits received particularly in the form of programs in the black and poorer communities.

In essence, the picketing began with an avowed purpose of demanding "reparations" from the plaintiffs. Thereafter and in the course of the trial the defendants endeavored to soften the impact of such demands. Mr. Street undoubtedly recognized that the original statement of boycott purposes was too broad, bordered on the illegal and was inappropriate as to businesses not really involved in any way with his political disputes and black-white controversies. He knows that his real arguments are with the government and not with the merchants. He tried to create and recite a lawful boycott purpose insofar as

the innocent businesses were concerned. We do not think he succeeded.

Mr. Street testified as follows (on September 19, 1978):

> "I think that Center City, Market Street East should be developed, but I think it should be developed mutually with the development of the communities. What we had hoped to happen is to send a message to the City, to the federal government, to whomever it is necessary, that you can develop Center City and ignore the communities if you want to, but we will not support you as long as you continue to ignore the needs of the community, the housing needs of the communities where we live. We will not support The Gallery, we will not support your new Gallery, we will not support your new Gallery that's coming, until you change your policy to begin to address yourself to some of the needs that we have in the community where we live."

Mr. Street made it clear that the purpose of the boycott was to deliver a message to the City and that The Gallery was to be bankrupted and sunk unless that message was acknowledged and acted upon. In another approach Mr. Street made it clear that the bankruptcy of The Gallery and its businesses might be a necessary price in order for him to focus attention on the needs of the black community.

Mr. Street testified as follows (on September 19, 1978):

> "THE WITNESS: I think the obligation should be to—could come in several forms. I think the merchants who are receiving that benefit, that substantial benefit from being there, could organize and have an escrow fund to help us with housing in North Phila-

delphia. They could help us with housing anywhere. I think that they could organize to help us open up a larger business on Columbia Avenue, Susquehanna Avenue. I think that they could make a contribution to organizations that are dealing with social problems in the communities where we live. After all, they are receiving the benefit. They have received the benefit from the substantial sums of money that come from the federal government. (N. T. 106-107)

* * *

"THE WITNESS: Well, what I am saying was, the purpose of the boycott is not just to sink The Gallery. We have no real motive, no real purpose, nothing can be gained by boycotting or bankrupting The Gallery. However, there is something to be gained if the people who put all of the—or a substantial amount of public funds into The Gallery, and who intend to put substantial large amounts of funds into the expansion of The Gallery to buy or purchase and rebuild, or to build The Gallery in the ten hundred block of Market Street. We would not hesitate in doing that.

BY MR. (JOHN) STREET:

Q. You wouldn't hesitate—

A. Sinking, bankrupting them." (N. T. 108)

Mr. Street further testified as follows (on October 16, 1978):

"A. The merchants wouldn't have to particularly do anything for me to end the boycott. What has to happen is the city administration, we are after the city administration, the Redevelopment Authority, the Rizzo administration, the people who are spending the money, the people who are putting the money

> we are boycotting a public building, a building that was built with a substantial amount of public funds. That's what we are boycotting. We are asking people not to go in that building for the reasons that I prior stated.
>
> The city administration, the Redevelopment Authority, the John Gallery Office—not The Gallery, but John Gallery, those are the people who can resolve our problem; those are the people that we can talk to about what they can do for North Philadelphia." (N. T. 63-64)

Although the defendants are very vague as to just how they expect to accomplish their purposes, at the bottom line they make it clear that the dispute is not with The Gallery. Their dispute is with the City Administration, the Authority and HUD, which must act to meet and satisfy the boycotters' demands and needs. It is stated that the plaintiffs' businesses are boycotted because they occupy a building constructed with the aid of public funds and therefore they receive benefits arising out of the expenditure of public funds. Mr. Street claimed a First Amendment right to boycott any institution or building that benefited directly or indirectly from public funds which could have gone into the black community. It is conceded that the funds used to construct The Gallery were never allocated or earmarked for housing or any other purposes.

Mr. Street tried to portray a dispute with the merchants and Gimbels. He did not succeed. He testified (see N. T. 68-69 and 73 of October 16, 1978):

> "By Mr. (John) Street:
>
> Q. You have a dispute with the merchants of the Gallery that you have described on direct examination.

A. Absolutely.

Q. What must the merchants do to resolve that dispute?

A. The merchants can—

Q. Not what they can, what must they do?

A. They can't.

Q. They couldn't do anything to resolve it?

A. They can't

* * *

"What I want to know is: what must the merchants do in order to resolve the dispute which you and your group have with them?

A. I don't know.

Q. You don't?

A. Not at this point, I don't know.

Q. What must Gimbels do in order to resolve the dispute which you have with them, as you have described it?

A. I don't know at this point."

In addition to the foregoing, the demonstrators protested against the fact that Gallery businesses were not owned by blacks. The record and History are clear that the reason that there are only few black business owners in The Gallery is not related to any discrimination by Rouse or any conduct of Rouse or, indeed, to any particular governmental conduct. It is a result of the absence of or limited availability of black capital—which, in turn, is a result of the historical disparities between the accumulation of white and black capital.

The demonstrators also protested against police brutality, the treatment of the Move group, the policies of the City government and in opposition to a proposed change in the City Charter with regard to mayoral succession.

They also protested about problems of black unemployment and problems relating to schools. The plaintiffs have no relationship to any of these issues whatsoever.

Scapegoat is defined in Webster's Third New International Dictionary [8] as a "person, group, race or institution against whom is directed the irrational hostility and unrelieved aggression of others." In this case, The Gallery [8a] is designated as the "target"—as the goat. None of the defendants' grievances can be redressed by The Gallery. However seriously the defendants injure the plaintiffs, the plaintiffs remain powerless to meet or satisfy or to affect or effect the demands of the defendants. The defendants assert grievances against the Police Department, the City of Philadelphia, the Redevelopment Authority and the Department of Housing and Urban Development. They do not have any real or actual dispute whatsoever with The Gallery collectively, or with the ninety-four individual proprietors, except for their very existence. Yet the demonstrators have chosen as their targeted victim The Gallery which is defenseless to meet the demands of the picketers.

Scapegoat boycotting urges concerted refusal to have business relationships with a "target" consisting of a limited number of persons, for the purpose of protesting against and symbolizing protest against the actions and conduct of third parties, although the "target" has no relationship to or involvement in or any control over or power to affect the primary disputes between the protestors and

8. The term "scapegoat" traces to an ancient Biblical ritual described in Leviticus XVI. 10. On the Day of Atonement the high priest symbolically transferred the sins of the people upon a goat, which then was banished into the desert to die.

8A. In this Opinion it is obvious we sometimes use the term "The Gallery" to include Gimbels and Rouse and sometimes Strawbridge and Clothier.

the third parties. As to the "target" the sole purpose of the boycott is to cause damage, injury and destruction for symbolic purposes. In a true scapegoat boycott the "target" has no power or authority to force concessions from the third parties. In a true scapegoat boycott there is no real or bona fide dispute, primary or secondary, between the "target" and the boycotters.

The absence of any dispute has crucial implications. Assuming a dispute, a picketed business could negotiate an agreement and free itself from the economic effect of the picketing. In this case, the plaintiffs are helpless; there is nothing they can do to affect or effect the stated purposes of the protest. Only the bankruptcy of the plaintiffs would appease the pickets.[9] The defendants hope that an injured or bankrupt Gallery will induce concessions from the government. They intend painful message and demand of the City and federal government that they can no longer ignore the defendants' communities.

A boycott such as that which occurred in *Claiborne Hardware, Inc. v. NAACP*[9A] is *not* a scapegoat boycott. In the *Claiborne* case blacks in Port Gibson, Mississippi, protested systematic white racial discrimination. A boycott was organized against all local white merchants demanding that they exert pressure on the city government to enact reforms. The Mississippi court found a conspiracy in violation of a state antiboycott law and a vio-

9. See and compare *E. M. W. Bar Corp. v. Hillard*, 20 D. & C. 2d 435 (1959).

9A. No. 78,353 (Miss. Ch. Ct. Aug. 9, 1976). See Madison, "Mississippi's Secondary Boycott Statute: Unconstitutional Deprivation of the Right to Engage in Peaceful Picketing and Boycotting," 18 How. L. J. 583 (1975); Sandifer & Smith, "The Tort Suit for Damages: The New Threat to Civil Rights Organizations," 41 Brooklyn L. Rev. 559 (1975); Note, "Political Boycott Activity and The First Amendment," 91 Har. L. Rev. 659 (1978).

lation of the state antitrust law and a tortious interference with business relations. That court rejected contentions that the state laws violated First Amendment rights of freedom of expression.

We do not agree with the rationale of the Mississippi court and we make it clear that this is not a sister opinion to that case. It is valid, indeed, for an oppressed group to protest and disturb the complacent discrimination of a dominant majority.[9B] And it must be valid, indeed, for a minority group to confront a majority group in protest of its discriminations. Illegality of purpose is imported only when the protest targets upon one or some few individuals for the purpose of scapegoating and symbolizing them. It is at that point that there is an unlawful invasion of the due process rights of survival of others.

The defendants' testimony clearly indicates the motivation underlying the boycott. The defendants feel that they have come away (comparatively) empty-handed in their attempts to secure housing monies and commitments from the City of Philadelphia and the federal government. Sensing that they have exhausted their administrative and political remedies, they have embarked on a new course of action—the boycott of The Gallery. Through this effort, they seek to communicate their grievances to the government. It is not Rouse or the merchants who can satisfy the demands of the demonstrators and boycotters. The defendants suggest that an injured or bankrupt Gallery can induce the government to meet the demands of the picketers, and thereby secure relief for the merchants from the burdens of the boycott.

9B. The bus boycott of 1955 by black citizens of Montgomery, Alabama, to protest racial discrimination (see N. Y. Times, Dec. 6, 1955, at p. 31 and Feb. 22, 1956 at p. 1 and Martin Luther King, Stride Towards Freedom (1958)) was in response to a primary dispute.

We hold that such strategy is a malicious misuse of the defendants' exercise of their First Amendment rights. Such scapegoat picketing does not enjoy the protections afforded to other forms of expressive conduct. The Gallery has been unlawfully targeted as an economic scapegoat to express the defendants' grievances against the government. Each plaintiff's business is a property right. *Truax v. Corrigan,* 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375 (1921). The property rights of the plaintiffs are protected by the Fifth and Fourteenth Amendments against this assault by the defendants. The defendants' rights of freedom of expression do not carry a right to maliciously damage and destroy the unrelated property rights of others. Scapegoat picketing goes beyond the pale of constitutionally protected rights of free expression. It is clearly a tortious invasion of property rights, to purposely injure an innocent and uninvolved party's business in order to coerce concessions from a third party government. Having no dispute with the picketers and having no power of correction, the plaintiffs' only recourse is to suffer damages. The defendants are engaged in a thinly disguised coercive assault, with what the law must regard as unlawful purpose and malevolent motives. Such unlawful conduct is not constitutionally protected as a supposed First Amendment expression in such circumstances.

The defendants have postulated that the plaintiffs had a duty to contribute to business and housing development in North Philadelphia and other poor minority neighborhoods because they received and accepted benefits from the government which could have gone to others. After an initial indication by the court that such demands might be unlawful, Mr. Street watered down the demand and said that plaintiffs "could" and not "should" set up a fund to help promote black housing and business interests.

However, in the context of the boycott, it is necessarily indicated that the boycott will continue until the plaintiffs perform their supposed obligations. There is no right or privilege to demand "reparations" or affirmative action from private persons not guilty of past or present discrimination. Affirmative action is a legal obligation of the government not of isolated individuals. With regard to all of defendats' grievances as to housing, black business ownership, charter change as to mayoral succession, police brutality, treatment of the Move group, education and schools, the plaintiffs have neither responsibility nor power to act. We will not protect the defendants' First Amendment conduct when expressed for extortionate and illegal purposes.[10]

The defendants argue that the court is not to be concerned with the plight of the merchants of The Gallery who are not parties to this suit. This contention ignores the effect of the defendants' actions, as well as the nexus between Rouse and its sub-tenants. Rouse has leased property to the merchants at a rental based in part on a percentage of volume in sales. Higher volume increases the rentals paid to Rouse. The merchants' gains or losses are also Rouse's gains or losses. Although they are not formally joined as parties to the suit, the merchants' interests are interwoven with Rouse's interests.

The defendants have alleged that they do have a dispute with Rouse. At the beginning of the trial, they were under the mistaken belief that there were no black store owners in The Gallery. In fact, one of the most common chants during the demonstrations of August 25 and 26, 1978, was "We don't own, so we don't shop." However, Mr. Street testified that the issue of black ownership was really irrelevant; that if The Gallery were entirely black-

10. See *United States v. Kubacki*, 237 F. Supp. 638, 640 (E. D. Pa. 1965); *United States v. Mitchell*, 63 F. 2d 187 (8th Cir. 1972).

owned the boycott would continue because the issue was addressed to the expenditure of public monies on housing.

The testimony indicated that approximately 44% of the employees of the retail stores are black and approximately 45 percent of the managerial and supervisory personnel of the retail stores in The Gallery are black; approximately sixty-eight percent of Rouse's employees are blacks; and approximately fifty percent of Rouse's supervisory and managerial personnel are black. The defendants did not offer a scintilla of evidence that Rouse discriminated against blacks in its leasing operations or that Rouse, Gimbels, Strawbridges or any of the 94 Gallery businesses was guilty of any act of discrimination against any minority.

This creation of an illusion of discrimination by Rouse and The Gallery businesses where there has been no discrimination whatsoever is a serious wrong. The boycott has aspects of libel and slander when it falsely portrays discrimination where there is none. To the extent that the defendants, by their protest, have created an impression to the public that the plaintiffs have been guilty of discrimination, that is a cruel hoax and an illegal destruction of the rights of innocent persons to engage in and operate a lawful business. The plaintiffs are entitled to the full protection of the law so that they cannot be cavalierly sacrificed to the supposition that the right to convey an important message imports the right to falsely accuse and resultantly injure or destroy persons who are not in any way party to the problems or plights of disadvantaged minorities.

This testimony reaffirms the fact that the defendants' real focus is upon the needs of the black community that are allegedly being ignored by the city and federal governments. The fact is that the boycott purposes were shifting and confusing in nature. In a sense the defendants simply

flailed out against The Gallery as a supposed symbol of the entire white community. The boycott arose out of the general economic disparities between whites and blacks and the entire historical patterns of white economic superiority. The defendants' ultimate focus became the contention that the government itself was the discriminating instrument and that public funds were being funneled discriminatorily into white communities and white operations to the prejudice of black communities in general and to the prejudice of the North Philadelphia black community in particular.

The only dispute with The Gallery is its very existence. The City, State and Federal Governments made policy determinations that The Gallery was a project which would share their common support. The Gallery has promoted economic stimulation to a formerly decaying part of the city. It provides over one-thousand new jobs and a six fold increased property tax base for the city. The defendants, however, are critical of the expenditure of government monies that do not address their housing grievances. Because The Gallery was the beneficiary of a public policy on the city, state and federal level, the defendants assert it is their right to injure or destroy that shopping complex to communicate their dissatisfaction with the policies and priorities of government. Such conduct is beyond the pale of constitutional protection.

In *Birl v. Philadelphia Electric Co.*, 402 Pa. 297, 301, 167 A. 2d 472 (1960), the Court adopted Section 766 of the Restatement of Torts which defines the tort of inducing a breach of contract or a refusal to deal: "one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby." This definition was refined to consist of

the following three elements, that "the actor must act (1) for the purpose of causing this specific type of harm to the plaintiff, (2) such act must be unprivileged, and (3) the harm must actually result."

In *Glenn v. Point Park College*, 441 Pa. 474, 272 A. 2d 895 (1971), the Court adopted the holding made by then Judge, now Chief Justice Eagen, in *Locker v. Hudson Coal Co.*, 87 D & C 264, 267-268 (Lackawanna Co., 1953):

> ". . . it seems established that a person's business is a property right in the pursuit of which he is entitled to protection from tortious interference by a third person, despite the absence of an express contract between the parties to continue their business relationship. This is certainly the trend of the law since the beginning of the twentieth century and the rapid growth of industry and trade. We do believe, however, that in order for there to be an actional wrong, it is necessary to plead and prove in a situation such as this: (1) that the acts complained of were wilful and intentional; (2) that they were calculated to cause damage to plaintiff in his business; (3) that they were done with the unlawful purpose of causing damage and loss to plaintiff without right or justifiable cause on the part of defendant; (4) that actual damage and loss resulted. The 'malice' above referred to does not imply any culpable intent but rather is it the intentional doing of a harmful act without justification or excuse. Defendant may have had under the present stated facts the legal right to do the acts complained of, but if they were done with the intent to injure plaintiff, then they were malicious and the malice makes unlawful that which otherwise would be lawful."

In discussing the elements of the tort of inducing a refusal to deal, the *Glenn* Court found that the existence of a prospective contractual relation between the third person and the plaintiff was a threshold ingredient. In *Adler, Barish, Daniels, Levin and Creskoff v. Epstein, et al.* — Pa. — , 393 A. 2d 1175 (1978), the Supreme Court recently affirmed the vitality of *Birl* and *Glenn* while modifying the privilege element of the tort. The focus is more on whether the conduct is "improper" rather than whether the conduct is "unprivileged." The Court adopted the guidance of Section 767 of the Restatement (Second) of Torts, which focuses on what factors were to be considered in determining whether conduct is "improper":

> "In determining whether an actor's conduct is intentionally interfering with an existing contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) The nature of the actor's conduct,
>
> (b) The actor's motive,
>
> (c) The interests of the other with which the actor's conduct interferes,
>
> (d) The interests sought to be advanced by the actor,
>
> (e) The proximity or remoteness of the actor's conduct to the interference and
>
> (f) The relations between the parties."

Applying the standards of *Birl, Glenn, Locker* and *Adler*, it is clear that the defendants are engaged in tortious conduct. The evidence indicates that (at least in its initial

stages) the boycott cost Gimbels and other merchants almost one-third to one-half of their estimated sales volume. The boycott, by its very terms, is intended to induce prospective customers of The Gallery to refuse to enter into any contractual relationship with The Gallery's merchants. Hundreds of prospective customers have refused to deal with the plaintiffs as a result of the defendants' conduct. The purpose of the boycott is to cause this specific type of harm to the plaintiffs. The defendants' conduct is "improper" due to its underlying malicious intent. There is no doubt that the plaintiffs have suffered considerable harm, both as a result of lost sales and in goodwill. All elements of the tort of "wrongful interference with prospective advantage" are here present.

The boycott violates Pennsylvania tort law as pronounced by the highest court in this Commonwealth. In *American Radio Association v. Mobile Steamship Association*, 419 U. S. 215, 95 S. Ct. 409, 42 L. Ed. 399 (1974) the Supreme Court held as did the Pennsylvania Supreme Court in *1621, supra*, that such tortious conduct in violation of state law and state policy could be enjoined.

In a line of cases that culminates in *International Brotherhood v. Vogt*, 354 U. S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347 (1957) the Supreme Court clearly established the principle that picketing-conduct or picketing-speech which is conducted for a purpose contrary to state law or state policy is not entitled to protection under the First Amendment.

In *Giboney v. Empire Storage and Ice Co.*, 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949), the picketing held enjoinable was a single and integrated course of conduct designed to compel a violation of Missouri's valid anti-trust law. The Court concluded that it was "clear that appellants were doing more than exercising a right of free speech or press. They were exercising their economic

power together with that of their allies to compel Empire to abide by union rather than by State regulation of trade. Similarly, in *Hughes v. Superior Court of California*, 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985 (1950), the objective of the picketing was to secure submission by a retail establishment to a demand for employment of Negro workers in proportion to the number of Negro customers. This objective was declared to be unlawful, for, if successful, the picketing would have caused the retailer to discriminate on the basis of race in its hiring practices, contrary to the then declared public policy in the State of California. The Supreme Court further added that it is immaterial that the State's policy is expressed by the judiciary as opposed to the legislature. In *International Brotherhood of Teamsters C. W. & H. Union v. Hanke*, 339 U. S. 470, 70 S. Ct. 773, 94 L. Ed. 995 (1950), the Supreme Court upheld a state injunction prohibiting picketing where the objective was contrary to a valid public policy of the State of Washington. In *Building Service Employees International Union v. Gazzan*, 339 U. S. 532, 70 S. Ct. 784, 94 L. Ed. 1045 (1950) decided the same day as *Hughes* and *Hanke*, the Supreme Court affirmed a State injunction which prohibited picketing where the objective was in violation of the State of Washington's statutory policy against employer coercion of employees' choice of bargaining representative.

Eventually, in *International Brotherhood v. Vogt*, *supra*, the Supreme Court established a definitive principle for application in so-called "unlawful purpose" cases. In that case, unions had sought unsuccessfully to induce some of Vogt's employees to join the unions. After their efforts failed, the unions commenced to picket the entrance to Vogt's gravel pit. As a result, drivers of several trucking companies refused to deliver and haul goods to and from the plant, and the company was substantially damaged.

At the request of Vogt, a Wisconsin trial court enjoined the picketing, and the Wisconsin Supreme Court upheld the injunction on the ground that the picketing was for an unlawful purpose, namely, to coerce the employer to interfere with its employees and their right to join or not to join the union. An appeal to the United States Supreme Court followed.

In rendering the Supreme Court's decision in *Vogt,* Justice Frankfurter carefully traced the evolution of the concept that states can enjoin picketing in violation of a valid public policy of the state. Noting the broad pronouncements of *Thornhill,* be observed (at p. 289):

> "Soon, however, the Court came to realize that the broad pronouncements, if not the specific holding, of *Thornhill,* had to yield 'to the impact of facts unforeseen,' or at least not sufficiently appreciated."

Justice Frankfurter further observed that the line of cases subsequent to *Thornhill* "made manifest that picketing, even though 'peaceful,' involved more than just communication of ideas and could not be immune from all state regulation." Those cases also demonstrated an awareness that the crucial question was not so much one of free speech but, rather, whether the state court had struck a proper balance between the communication activities and the competing interests of state policy. In concluding its discussion, the Court articulated the following principle (at 293):

> "This series of cases, then, established a broad field in which a state, in enforcing some public policy, whether of its criminal or of its civil law and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing an effectuation of that policy."

Recently the Supreme Court case applied the so-called "unlawful purpose" doctrine in *American Radio Assn. v. Mobile Steamship Assn.*, 419 U. S. 215, 95 S. Ct. 409, 42 L. Ed. 2d 399 (1974). There, maritime unions peacefully picketed and distributed leaflets at a public dock, urging persons to boycott foreign flagships allegedly employing non-American crews at substandard wages. The conduct of the unions was peaceful and non-violent. There was no mass picketing, no trespassing on the property of others, no blocking of ingress and egress, no assaults and no covert acts of force. A State trial court enjoined the unions' activities at the public dock.

The Alabama Supreme Court, relying on *Vogt, Hughes* and other "unlawful purpose" doctrine cases, held that there was sufficient evidence to support the trial court's finding that the conduct of the unions was done with the goal of interfering with the business of appellees in their shipping and farming operations, and, therefore, properly enjoined. State public policy was found to be violated because one of the purposes of the unions' action was to "wrongfully interfere" with appellees' business.

Relying on the *Vogt* case, the Supreme Court of the United States concluded that there was no labor dispute but that Alabama's interference with the unions' activities was well within "the broad field in which a state, enforcing some public policy, whether of its criminal or its civil law and whether announced by the legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." In response to the unions' claim that the injunction in *American Radio* was not supported by a "valid public policy," the Supreme Court stated (at 231):

> "In *Pennington*, the Supreme Court of Alabama indicated that state policy against 'wrongful interference' is quite analogous to the federal policy pro-

hibiting secondary boycotts and is based on similar considerations. The state policy also appears to be based on the state interest in preserving its economy against the stagnation that could be produced by pickets' disruption of the businesses of employers with whom they have no primary dispute. Under *Vogt, supra,* the state may prefer these interests over petitioners' interest in conveying their 'Ship American' message through the speech-plus device of dockside picketing."

Despite the unions' claims in the *American Radio* case that their activities were for informational and publicity purposes only, the Supreme Court found that another purpose of the unions' activity was to interfere wrongfully with the business at the state dock. Evidence of this prohibited purpose was based upon the testimony of a single union official charged with carrying out the picketing, who "had expressed the hope . . . that the port would become cluttered with foreign ships unable to load or unload and that the docks would be shut down." The Court upheld the Alabama Supreme Court's finding that to "wrongfully interfere" with the appellees' property interests was against state policy. The Court found *Vogt* to be controlling, and upheld Alabama's prohibition of petitioners' picketing. Thus, *American Radio* reaffirmed and established unequivocally that a state may enjoin picketing engaged in for a purpose contrary to the law and public policy of a state.

In *American Radio* distinguishable from this case because it is the conduct of the government itself (Redevelopment Authority) which is addressed in grievances? There would be grave danger if government were the silencer of protest against itself. We are not deciding anything with regard to the dispute between the defendants

and government. The defendants, by their conduct, make it clear that that is not the question before us. The defendants (perhaps as a sad result of their angers at historical and present mistreatment, discrimination and oppression) have moved beyond the pale of permissible conduct and have flailed out on various issues so as to strike at persons innocent of wrongdoing or involvement in these issues and who are admittedly unable to redress defendants' grievances or to respond to attacks upon them by correcting something. The boycott is a scapegoat boycott. The Gallery is unlawfully made a rallying point for what might otherwise be justified dissidence. Instead it is a scapegoat boycott for unlawful purpose.

Under the present state of the law in Pennsylvania, picketing is constitutionally protected as a means; however, it is not protected when used for the purpose of accomplishing an unlawful end. *1621, Inc. v. Wilson, supra.*

The legislature enacted the Urban Development Act to promote elimination of blighted areas and supply sanitary housing in areas throughout the Commonwealth. The Redevelopment Authorities, throughout the state, are authorized to engage in the elimination of blighted areas and to plan and contract with private, corporate or governmental redevelopers for their redevelopment. The Redevelopment Authority of the City of Philadelphia (RDA) is an agency of the Commonwealth of Pennsylvania whose sole purpose is to carry out and effectuate the purposes and provisions of the Urban Redevelopment Act.

Faced with a decaying downtown business district, and an exodus of the shopping public to the shopping malls located in the Philadelphia suburbs, RDA undertook to help rejuvenate retail business activity in center city Philadelphia. As part of this urban renewal plan, RDA

launched development of The Gallery. RDA contracted with the plaintiff, Rouse-Philadelphia, Inc., for the planning and development of The Gallery. The concept of this plan was initiated by the City Planning Commission *in the 1960's.* Pursuant to its statutory authority, RDA prepared and submitted plans which were approved by City Council. Councilmanic hearings were held so that the general public could present views relative to the plan. When RDA filed its Declaration of Taking, one of the tenants challenged the condemnation. The taking was upheld: *Simco v. R. D. A.,* 455 Pa. 438, 317 A. 2d 610 (1974). The general public had opportunity to make known any views relative to the Market Street East development.

R. D. A., however, was essentially a "pass-through agency which is carrying out the City's planning objectives in the Market Street Project (The Gallery)." (see D-8a). Before R. D. A., and Rouse-Philadelphia, Inc., entered into their lease agreement, they required certain assurances from the City prior to final approval by HUD. HUD's involvement was crucial because the Market East Project was constructed with some 24.5 million dollars of Federal monies. HUD was concerned that the City protect the public interest and improvements.

The Gallery was therefore a project which shared the support of municipal, state and federal governments. The planning and development of the project was an exercise of public policy at three governmental levels designed to rejuvenate public and consumer interest in the center-city business district, develop a stronger tax base, provide over one thousand jobs and fight urban decay.

It is not within the province of this Court to pass upon the wisdom of such policy decision. We must determine whether defendants' conduct is intended and designed to defeat the implementation of the public policy of the State.

The defendants believe that governmental expenditure of public monies in Philadelphia should address their housing grievances. Because The Gallery has benefited from government monies, though not monies which defendants would have received, it has been targeted as an economic scapegoat. The defendants state the problem with simplicity—if they are not the beneficiaries of these or other public monies, then they shall act to destroy the Gallery (or any other chosen target) because it was chosen instead as a beneficiary for governmental assistance. Instead of mobilizing their forces for purposes of legislative and policy input, the defendants have chosen to injure the manifestation of what they consider an irresponsible and discriminatory policy. Such unjustified injury is malicious in law. Where the defendants maliciously attempt to injure plaintiff's business, they are in violation of Pennsylvania tort law and the long term public policy of the State. The law is clear that picketing for purposes contrary to State law or State policy can be enjoined in its entirety. The people of the City and the Commonwealth have the right to expect that the courts will protect the implementation of public policies.

It is troubling that as a result of the illegal objective underlying the defendants' protestations, they have lost some of their rights to express otherwise protected speech. We considered whether we could carve out and prohibit the unprotected speech, while still permitting the protected informational speech. Unfortunately, a resolution along such lines by way of a bifurcated order appears to be impossible.

The protestors' mob-like activities of August 25 and August 26, 1978, left an indelible false impression in the eyes of some of the public that The Gallery was supposedly guilty of discrimination and that it was in some way responsible for defendants' grievances. Picketing

continued at The Gallery on virtually a daily basis. The public was left with the impression that The Gallery had done "something" to warrant being picketed. The initial purpose of the picketers was to injure or destroy The Gallery and that is still the picketing and boycott purpose. The defendants engaged in some informational picketing, but their constant advocacy is to "Boycott The Gallery." Unfortunately the defendants' unlawful purpose taints the entirety of their expressive conduct. The Pennsylvania Supreme Court held that picketing may be enjoined if one of its objects is unlawful even though not the sole object. *Anchorage, Inc. v. Waiters and Waitresses Union,* 383 Pa. 547, 119 A. 2d 199 (1956). In this case the otherwise protected speech is inextricably interwoven with the unprotected speech. The public is unable to discern between what constitutes acceptable speech conduct and that which is enjoinable. Otherwise legitimate speech interests lose their special privilege under the law when so intertwined with unlawful purposes. We must therefore prohibit all of defendants' speech interests at The Gallery in furtherance of scapegoat boycotting.

The defendants have argued a combination of two themes: 1) that under the law and the Constitution of the Commonwealth of Pennsylvania a court of equity will not enter an injunction which operates as a prior restraint on speech, *Willing v. Mazzocone,* — Pa. —, 393 A. 2d 1155 (1978); and 2) that it is axiomatic in First Amendment cases that there is no right or power in the government to consider the content of speech or to distinguish speech on the basis of its message, *Police Department v. Mosley,* 408 U. S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972).[11]

11. *Hudgens v. N. L. R. B.,* 424 U. S. 407, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976); *Organization For A Better Austin v. Keefe,* 402 U. S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1, (1971); *Cohen v. California,* 403 U. S. 15, 24, 91 S. Ct. 1780, 29 L. Ed. 2d 284, 293

In the *Willing v. Mazzocone* case, lawyers sought to enjoin a former client from picketing and libelous conduct which falsely charged the attorneys with stealing her money and "selling out" to an insurance company. Her conduct included carrying a sandwich-type board sign denouncing the lawyers, pushing a shopping cart on which she placed an American flag, and continuously ringing a cow bell and blowing a whistle to attract attention. There was some indication she was mentally ill. *Mazzocone* is not controlling here. It held, *inter alia,* that defamation will not be enjoined by a court of equity. Mr. Justice Manderino stated on behalf of a 4-3 majority (of which majority 3 were concurrences) as follows:

> "Our conclusion that the equity court violated appellant's state constitutional right to freely speak her opinion—regardless of whether that opinion is based on fact or fantasy—regarding appellees' professional integrity obviates the need for any discussion here of federal law."

The *Mazzocone* case must be distinguished from this case. *Mazzocone* addressed the power to impose a prior restraint on defamation. This case only minimally involves possible defamation insofar as there is a false portrayal of discrimination. This case addresses the power of equity to enjoin speech of the picketing and boycott class, when such picketing-speech is exercised for an unlawful purpose. The Supreme Court did not consider any

11. (Cont'd.)

(1971); *Street v. New York,* 394 U. S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969); *New York Times Co. v. Sullivan,* 376 U. S. 254, 269-270, 84 S. Ct. 710, 11 L. Ed. 2d 686, 700, 95 A. L. R. 2d 1412 (1964) and cases cited; *NAACP v. Button,* 371 U. S. 415, 445, 83 S. Ct. 328, 9 L. Ed. 2d 405, 425 (1963); *Wood v. Georgia,* 370 U. S. 375, 388-389, 82 S. Ct. 1364, 8 L. Ed. 2d 569, 579 (1962).

question as to Ms. Willing's purpose. The Court did not decide the effect, if any, of an unlawful purpose upon the otherwise undoubted right to freedom of expression.

In Mr. Justice Pomeroy's concurring opinion he referred to Judge (now President Judge) Jacobs' dissenting opinion (joined by Judges Hoffman and Spaeth) in the Superior Court (246 Pa. Super. Ct. 98, 109, 369 A. 2d 829, 834 (1977)) and incorporated it by reference into his concurrence. In his dissent Judge Jacobs stated (at p. 836):

> "There are a few exceptions to the rule prohibiting an injunction against libel or slander. For example, an injunction may be granted where the false statements are part of a conspiracy to injure, or where there is intimidation or coercion."

And he stated (at p. 838): "Equitable jurisdiction to interdict libelous publication has been assumed . . . where there is a conspiracy to maliciously injury a plaintiff's business or property (citing cases)." Judge Jacobs noted an absence of such evidence.

Thus, in *Mazzocone* the only reference to free speech in conjunction with an unlawful purpose and malicious intent to injure indicates that such speech may sometimes be enjoined. *Mazzocone* is distinguished on another ground. Ms. Willing had a primary dispute which gave rise to her conduct. She believed, reasonably or unreasonably, that her attorneys owed her twenty-five dollars. In this case, the demonstrators have no dispute with the plaintiffs. This absence of a dispute has critical significance in the context of an economic boycott. In this case, where no dispute exists, plaintiffs are unable to address or deal with the defendants' demands. We conclude that the law which prohibits prior restraint does not restrict our authority to enjoin a scapegoat boycott and picketing and speech conducted for unlawful purposes.

In *Police Department v. Mosley,* 408 U. S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972) the Court stated: "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." Out of this restriction it is often too flatly stated that the courts, therefore, may not examine or consider the nature of or content of speech. The fact is and the cases show that the courts do examine content and they must examine content in order to make decisions and to determine whether speech enjoys the full protection of the First Amendment.

In *Chaplinsky v. New Hampshire,* 315 U. S. 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) the Court stated:

> "(I)t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

It is not the right to lie which is of value or the subject of First Amendment protection—it is the right to speak (and hopefully and incidentally—but only hopefully and incidentally—to tell the truth). The power to suppress the right to lie may pour over into a power to suppress ideas and truth. We tend to absolutize the right

of speech in order to avoid erosion of the right. But we cannot lose sight of the fact that the right of speech is not absolute.

In *F. C. C. v. Pacifica Foundation,* — U. S. —, 98 S. Ct. —, 57 L. Ed. 2d 1073 (1978) Mr. Justice Stevens stated: "The order must therefore fall if . . . the First Amendment prohibited all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution."

In *Schenck v. U. S.*, 249 U. S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470 (1919) Mr. Justice Holmes made it clear that both the content and the context of speech are subject to examination by courts in order to determine whether First Amendment protections apply and the scope of such protections.

In a boycott speech as a stuff can be lethal. When it is used for such purpose and we evaluate the validity and propriety of purpose we are necessarily examining content. The prohibition is against examining content to evaluate the acceptability of its ideas. There must be examination in order to determine whether the speech violates criminal law, public policy or tort law. There must be examination in order to determine whether the speech is for a lawful or an unlawful purpose. We conclude that the general rule which prohibits inquiry into the content of speech does not restrict our authority to inquire into the lawfulness of boycott purpose.

ENTITLEMENT TO PRELIMINARY INJUNCTIVE RELIEF

A preliminary injunction should be issued when three requisites are met: 1) its issuance is necessary to prevent immediate and irreparable harm; 2) greater injury would

result by refusing the preliminary injunction than by granting it; and 3) until a final determination can be made, the decree properly restores the parties to their status as it existed immediately prior to the alleged wrongful conduct. *Alabama Binder and Chemical Corp. v. Pennsylvania Industrial Chemical Corp.*, 410 Pa. 214, 189 A. 2d 180 (1963).

Where the defendants have engaged in an unlawful scapegoat boycott and have engaged in mass demonstrations, both inside and outside The Gallery, have wrongfully interfered with the plaintiffs' property and business rights, have caused the plaintiffs to lose sales and business, have trespassed on plaintiffs' property, and have intimidated and interfered with customers, employees and merchants inside and outside The Gallery and Gimbels, greater injury would result by refusing the preliminary injunction than by issuing it, and its issuance is necessary to prevent further immediate and irreparable harm. If the parties so wish, they may agree that the Preliminary Injunction Decree shall be and become a final decree and, therefore, immediately appealable.

We shall append to this opinion, wherein we have concluded that all scapegoat boycott activity is illegal and must be enjoined, our findings of fact and our conclusions of law. We are also filing herein a Supplemental Opinion upon the assumption that our conclusions that all boycott activity must be enjoined is incorrect. In the Supplemental Opinion we have considered the manner in which boycott activity, if lawful, may be conducted. Repetition of our findings of fact and our conclusions of law is unnecessary. Each opinion should be deemed to incorporate therein all findings of fact implicit in the other opinion. Although this procedure greatly lengthens our opinions, in this way we intend to make the record and our disposition complete, so that an appellate court need not at some future time remand the matter.

In view of all of the foregoing, we conclude that under the established law and public policy of this Commonwealth, the plaintiffs' rights to engage in business and earn a livelihood transcends the defendants' rights to freedom of speech, particularly when such speech is used for purposes of scapegoat boycotting and to maliciously injure and destroy plaintiffs' business interests. Accordingly, we enter the following decree and order:

IN THE
COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

TRIAL DIVISION

AUGUST TERM, 1978
No. 4145

ROUSE PHILADELPHIA INC.

and

REDEVELOPMENT AUTHORITY OF
THE CITY OF PHILADELPHIA,

Plaintiffs,

and

GIMBEL BROTHERS, INC.

and

GIMBEL BROTHERS REALTY CORP.,

Intervening plaintiffs

v.

AD HOC '78

and

T. MILTON STREET AS AN INDIVIDUAL AND AS A REPRESENTATIVE OF AD HOC '78 THE UNINCORPORATED ASSOCIATION OF PERSONS ACTING IN CONCERT TO BLOCK INGRESS TO AND EGRESS FROM THE GALLERY AT MARKET EAST

and

JOHN DOE AND JANE DOE

and

ALL OTHER PERSONS ACTING IN CONCERT WITH THE NAMED PARTICIPANTS OR OTHERWISE PARTICIPATING IN THEIR AID

Defendants

Decree and Order

AND Now, this 31st day of January, 1979, the temporary and special injunction orders heretofore issued by this court on August 26, 1978 are modified and amended as follows:

1. Defendants, T. Milton Street and Ad Hoc '78, together with their agents, servants and those acting in their interest or at their direction, are enjoined and restrained preliminarily, until final hearing, and thereafter until further order of this court, from picketing, handbilling, speechmaking, demonstrating, and boycotting inside or outside The Gallery or Gimbels, including the public areas therein, or on any of the three colonnades located outside the entrance to Gimbels, or the exterior courtyard area, or the sidewalk which forms the immediate perimeter surrounding The Gallery, Gimbels and Strawbridge' stores.

2. The Sheriff of Philadelphia County, with the assistance, when necessary, of the Civil Affairs Unit of Philadelphia Police Department, or any other necessary law enforcement agency, is directed to use all power under the law to insure full compliance with all of the terms of this Preliminary Injunction.

3. That the Sheriff of Philadelphia County is authorized, at all times during the term of this Injunction Decree, to have such personnel or representatives present at The Gallery building and/or the areas contiguous thereto as he shall deem necessary for the purposes of enforcing this decree.

4. That the two bonds heretofore filed herein by Plaintiff Rouse Philadelphia Inc. in the sum of $5,000.00 each, conditioned for payment of such costs and damages as may be incurred or suffered by any party found to be wrongfully enjoined and restrained, shall remain in full force and effect and no additional bond is required.

5. This Decree and Order shall remain in full force and effect until such time as this Court specifically orders otherwise.

6. All orders and decrees heretofore entered are superseded by and are merged into this decree and order.

BY THE COURT:

I. RAYMOND KREMER

IN THE
COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
TRIAL DIVISION

AUGUST TERM, 1978

No. 4145

ROUSE PHILADELPHIA INC.

and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,

Plaintiffs,

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GIMBEL BROTHERS, INC.

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GIMBEL BROTHERS REALTY CORP.,

Intervening plaintiffs,

v.

AD HOC '78

and

T. MILTON STREET AS AN INDIVIDUAL AND AS A REPRESENTATIVE OF AD HOC '78 THE UNINCORPORATED ASSOCIATION OF PERSONS ACTING IN CONCERT TO BLOCK INGRESS TO AND EGRESS FROM THE GALLERY AT MARKET EAST

and

JOHN DOE AND JANE DOE

and

ALL OTHER PERSONS ACTING IN CONCERT WITH THE NAMED PARTICIPANTS OR OTHERWISE PARTICIPATING IN THEIR AID

Defendants

Findings of Fact and Conclusions of Law

In addition to the findings of fact and conclusions of law implicit in the Opinion and Supplemental Opinion we make the following

FINDINGS OF FACT

The Parties

1. Plaintiff, Rouse Philadelphia, Inc., (hereinafter, for purposes of brevity, sometimes referred to as "Rouse"), is a Maryland corporation licensed to do business in Pennsylvania. It is engaged in the business, *inter alia*, of operating an enclosed, four-level shopping mall known as The Gallery, located in downtown or center-city Philadelphia. The Gallery accommodates approximately 106 retail businesses which lease their places of business from Rouse. Ninety-four retail businesses are presently doing business in The Gallery.

2. Plaintiff Gimbel Brothers, Inc., (hereinafter, for purposes of brevity, sometimes referred to as "Gimbels") is a New York corporation duly licensed to do business in Pennsylvania. Gimbels is primarily involved in the operation of retail department stores and operates a large department store located in downtown or center-city Philadelphia. Sometimes the term Gallery is erroneously used to also include the stores operated by Gimbels and Strawbridge & Clothier.

3. Plaintiff Gimbel Brothers Realty Corporation (hereinafter, for purposes of brevity, sometimes referred to as "Gimbels Realty") is a Pennsylvania corporation. It is a wholly-owned subsidiary of Gimbels involved in the ownership and leasing of real estate.

4. Plaintiff Redevelopment Authority of the City of Philadelphia (hereinafter, for purposes of brevity, sometimes referred to as the "Authority" or as RDA), is a non-profit Commonwealth authority, established pursuant to the Urban Redevelopment Law, Act of May 24, 1945, 35 P. S. sec. 1701 *et seq.* The Redevelopment Authority is a public agency. The Redevelopment Authority owns The Gallery and was the developer and general contractor for the construction of The Gallery. The Authority is authorized, *inter alia,* to exercise the right of eminent domain, purchase and acquire real estate, clear buildings and other improvements therefrom, enter into agreements with others, own real estate and convey it or lease it to others, all for the purposes of redevelopment of real estate and the elimination of blighted areas.

5. Defendant Ad Hoc '78 (hereinafter, for purposes of brevity, sometimes referred to as "Ad Hoc") is an unincorporated association of various organizations and their members, too numerous to mention, acting in concert to induce the public to boycott the retail stores in The Gallery and Gimbels department store. Its offices are located at 1625 Columbia Avenue, Philadelphia, Pennsylvania.

6. Defendant T. Milton Street (hereinafter, for purposes of brevity, sometimes referred to as "Milton" or "Street") is an individual who resides in North Philadelphia, west of Broad Street, in the City of Philadelphia. He is a candidate for election to the General Assembly

in November, 1978.[1] He is a representative of and chairman of Ad Hoc.

7. Defendants John Doe and Jane Doe are names for unidentified persons associated with members of Ad Hoc and other individuals who are acting in concert with Street and Ad Hoc to boycott The Gallery and Gimbels. The identities of relatively few persons involved in the boycott has been made known.

The Subject Property

8. The Gallery and Gimbels' store are located on property which was owned by the Authority. That property was acquired by the Authority through condemnation to accomplish its purposes. The property is located in and is part of a larger area known as the Market Street Urban Renewal Area which was acquired by the Authority for redevelopment purposes.

9. The subject property is located within the downtown or center-city area of Philadelphia. It includes the entire block bounded by Tenth, Market, Ninth and Filbert Streets, in addition to a substantial portion of the block bounded by Ninth, Market, Eighth, and Filbert Streets.

10. The area in question is bounded by public streets and sidewalks on all sides. The approximate widths of the public streets in question are as follows: (a) Market Street (between 8th and 10th)—62 feet; (b) Tenth Street (between Market and Filbert)—28 feet; (c) Ninth Street (between Market and Filbert)—30 feet; (d) Filbert Street (between 9th and 10th)—currently blocked off because of construction.

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1. He was elected to the General Assembly after the hearings closed.

The approximate dimensions of the public sidewalks are as follows: (a) Market Street (between 9th and 10th) —19 feet wide and 416 feet long; (b) Tenth Street (east side between Market and Filbert)—13 feet, 10 inches wide and 337 feet long; (c) Ninth Street (between Market and Filbert)—(1) west side—12 feet wide and 337 feet long, (2) east side—13 feet, 10 inches wide and 337 feet long; (d) Filbert Street (between 9th and 10th) —there is no sidewalk yet due to construction.

11. The walkways or corridors in the public areas are of the following dimensions:

The Mall level corridor between Gimbels and the Market Fair areas is approximately 40 feet wide and 170 feet long. This corridor continues on a straight line to the mall entrance to Strawbridge and Clothier. This corridor is approximately 333 feet long and between 28 and 35 feet wide. From this corridor another corridor extends in a northerly direction by the area called the "Bull Market." This corridor continues to two subway entrances and exits. This corridor is approximately 10 feet long and averages about 30 feet wide.

In addition, on the mall level there is an interior courtyard immediately inside the 9th and Market Street entrance which is approximately 68 feet by 70 feet.

The corridor on the street level varies in width but is generally between 11 and 12 feet wide. The width is approximately 60 feet wide in one section where two perpendicular walkways intersect, and approximately 30 feet wide adjacent to Strawbridge's street level entrance. Ninth Street intersects the continuity of the length of the corridor. The length of the corridor on the street level is approximately 180 feet from 10th Street to 9th Street and 96 feet between 9th Street and the beginning of Strawbridge's store.

On the second level the corridor is approximately 332 feet long. The width varies, but generally is between 11 and 12 feet wide. There is another corridor which is about 82 feet long by 10 feet wide.

The corridor on the third level is approximately the same as the second level except there is an additional corridor approximately 15 feet wide and 118 feet long which leads to an entrance to the Philadelphia Parking Authority garage.

Two escalators operate between levels of the Mall and are capable of carrying two persons per tread. Two elevators have a combined capacity of ten to fourteen persons.

12. The exterior courtyard area is that area on the immediate outside of the "9th and Market Street" entrance. It includes four sets of steps coming from three different directions. On the Market Street side, the design consists of six steps, followed by a four foot landing, followed by another six steps, another landing, another six steps, another landing, then seven steps and then about an eight foot level area to the doors. The design is the same from the Ninth Street direction, the only difference being at the top tier, which has about a thirty foot concrete bench instead of the first set of six steps.

13. On April 15, 1975, the Authority conveyed to Gimbels Realty, in fee simple, a certain portion of the redevelopment area in question. That area includes the Gimbels Store at 10th and Market Streets (contiguous to The Gallery proper) and that portion on the first level of The Gallery which is known as Market Fair; three bricked-in colonnades on the street level immediately outside and adjacent to the entrances to Gimbels and The Gallery; and that area containing escalators and stairs, which extends from The Gallery street level entrance at

Tenth and Market Streets into the mall level of The Gallery (hereinafter included as part of the Tenth and Market Streets colonnade). That property, known as Parcel #7, occupies a substantial portion of the city block bounded by Tenth, Market, Ninth and Filbert Streets.

14. The Gallery building, owned and partly constructed by the Authority, occupies a substantial portion of the city block bounded by Tenth, Market, Ninth and Filbert streets and a substantial portion of the city block bounded by Ninth, Market, Eight and Filbert streets. There is a pedestrian bridge connecting the part of The Gallery on the east side of Ninth Street with that on the west side of Ninth Street. The Gallery building is contiguous with and connected to the Gimbels store on the west and another large department store, Strawbridge & Clothier, located to the east in the city block bounded by Ninth, Market, Eight and Filbert Streets, thus creating a large unified shopping complex.

15. RDA spent approximately 24.5 million dollars of HUD Urban Renewal funds to acquire the land and construct The Gallery. The federal funds were used to construct the exterior shell and Public areas of the building. Rouse was responsible for completing the subtenant space and received an approximately 9 million dollar loan from RDA to accomplish this. Rouse has reimbursed RDA this money. The City also spent over a million dollars in the construction of The Gallery. Gimbels expended $30,000,000 in the construction of its store.

16. On December 16, 1975, the Authority entered into a lease agreement (hereinafter, for purposes of brevity, sometimes referred to as the "Authority Lease" or "Lease") whereby the Authority leased to Rouse for a period in excess of ninety-nine years certain portions of The Gallery referred to and described as the Leased

Premises. The purpose of the Lease is stated to be ". . . for the promotion of health, safety, convenience and welfare of the citizens of Philadelphia; for the purpose of eliminating the blight in the Market Street Urban Renewal Area; and to develop in lieu thereof a multi-level, enclosed retail mall, public areas, and other improvements to increase the land value therein, increasing tax ratables in the city, and creating additional job opportunities therein." Rouse was required to construct the space for the tenants' stores.

17. The premises are defined in section 2.1 and it includes certain specified areas in The Gallery, together with any and all present and future easements, rights and appurtenances relating to such premises, including easements in the Public Area (said premises together with all such easements, rights and appurtenances being hereinafter collectively referred to as the "Leased Premises").

18. The portion of the Leased Premises known as the "Leased Area" was designed by Rouse for subletting to various sublessees who were to operate retail enterprises. Those areas designed for occupancy by sub-tenants are referred to in the lease as "Retail Areas."

19. The Authority Lease also refers to a certain area in The Gallery as "Public Areas." The "Public Area" is that portion of The Gallery which is constructed wholly outside of the Leased Premises and which is intended for use by the public, Rouse and its sublessees, and the customers and invitees of the sublessees. The Lease provides in section 12.1 that Rouse is granted a non-exclusive easement in the Public Area for the benefit of Rouse and its licensees, its sub-tenants, and their customers, agents and employees for the use of the Public Area for the purposes for which it, the Public Area, was designed. The Author-

ity has never dedicated the Public Area of The Gallery for general use by the public at large.

20. There is an ambiguity in the Lease as to whether or not the Public Area is included within the Leased Premises (section 2.1) or is "wholly outside the Leased Premises." (Art. I, P-5) We have concluded that the Public Areas are not part of the property leased by Rouse. However, we find that the Public Areas cannot be used for purposes antithetical to the very retail purposes of the mall; that it was never intended that the public could so use the public areas for the purpose of interfering with the tenant's businesses and rights to do business.

21. In section 16.8 of the Authority Lease, the Authority warrants that "nothing in this Lease, other than enforceable third-party rights, specifically acknowledged in this Lease, shall be construed to constitute or create rights in any person, firm, or other entity not a party hereto (as a third-party beneficiary, or otherwise) . . ."

22. In the Authority Lease, the Authority granted to Rouse substantial control and rights with respect to the Public Areas, for which Rouse gave consideration. Some of the applicable provisions of the Lease reflecting Rouse's rights of control with regard to the Public Area are as follows:

> (1) In section 3.4 the Lease contains a covenant of quiet enjoyment whereby the Authority grants to Rouse the right to "lawfully, peaceably, and quietly hold, occupy and enjoy the Leased Premises." Rouse has a right to terminate upon "material breach" of this covenant of quiet enjoyment.
>
> (2) In section 8.2 the Lease provides: "The Public Area shall be open and operated, and all public entrances thereto shall be open, during the hours

when the Retail Area or any part thereof is open for business, and also for one-half hour prior to the opening and one-half hour after the close of business of the Retail Area. The Public Area allowing ingress and egress to and from all transportation facilities shall remain open at all times except when closing may be required for security purposes." Rouse is required to pay a portion of the cost of maintaining the Public Area.

(3) In section 8.4 Rouse is required to contribute to a reserve fund to be used in part for the replacement of the structural portions of and equipment located in the Public Area.

(4) In section 7.1 Rouse had the right to participate in the selection of the contractor to construct the Public Area and the right to select the architects, designers and consultants to "design, coordinate and advise (the Authority) on graphics, landscaping and pedestrian mall finishes in the Public Area." Rouse contributed one third of the cost of architectural, engineering and consulting fees allocable to the Public Area.

(5) In section 8.7 any alterations which the Authority desires to make in the Public Area must be approved by Rouse. The Lease provides that Rouse can withhold its consent if the proposed alteration etc. in any way *impedes pedestrian access to the* retail area, that is, to the shops in The Gallery.

(6) In section 10.12 Rouse has the right to participate in the selection of any contractor hired to make restorations in the Public Area.

(7) In section 13.3 Rouse is given the right to complete construction of the Public Area if the Authority fails to do so.

(8) Rouse has the right to enter into a mortgage which would subject the Authority's reversionary interest in the Leased Premises and its fee simple estate in the Leased Premises, including the Public Area, to the lien and encumbrance of Rouse's mortgage. The Lease also provides that if the Authority refuses to execute any such mortgage, Rouse has the right to occupy the Leased Premises rent free until the mortgage is executed by the landlord or to terminate the Lease and its other obligations under the Lease. Rouse, in fact, mortgaged its leasehold interest, thereby subjecting the reversionary interest of the Authority to the lien and encumbrance created by the mortgage.

23. The Gallery, including the "Public Area," involves private and public interests. For example, HUD, which provided some of the funds for the construction of The Gallery, granted a waiver of competitive bidding which would otherwise have been required for the construction of The Gallery, absent the intermingling of both public and private development activities. HUD recognized that The Gallery could not have been constructed unless Rouse was involved because the success of The Gallery was dependent upon Rouse both from the development standpoint and the financial standpoint. Because of the complex interconnection between the public and private areas, the Public Area was not dedicated to the City.

24. The defendants' own Exhibits D-7 through D-18 make it clear that, despite concerns by HUD, Rouse was granted a substantial measure of control with regard to the Public Area serving the retail stores.

(a) Exhibit D-16, a July 9, 1975 letter from Hillel S. Levinson, Managing Director of the City of

Philadelphia to HUD was designed to convey certain assurances that the City of Philadelphia would fully protect the public interest in the various public improvements designed and constructed with Federal Title I monies.

On page two of this letter, Mr. Levinson stated the following:

> "The pedestrian ways created with Title I monies will serve the function of creating a humane public thoroughfare in an enclosed climate-controlled street separate and apart from the congestion, noise, and pollution of the City street system. Additionally, the enclosed public street will allow for ease of access to the many forms of mass transportation existing or proposed for the project area; . . ."
>
> • • •
>
> "Notwithstanding the above tasks, this letter will provide absolute issurance of the City's intention to adequately protect the public interest in all of the improvements designed and constructed with Federal Title I funds and that the operation and maintenance of such facilities will be sustained at a high level of quality. I stand ready to respond to any additional questions or comments should either HUD or the Redevelopment Authority so desire."

(b) HUD intended Federal monies to be used for the design, construction and protection of public areas and public thoroughfares.

(c) Although the public thoroughfares are comingled with non-exclusive private easement rights, the public thoroughfares are in fact enclosed public walkways.

25. The Gallery is a complex project, the effective development of which required the intermingling of public improvement with private development activities. In an

effort to insure that the public improvements would be subject to public control, HUD, which provided some of the financing for the project, wanted certain assurances that the public's interest in the Public Area would be protected and that HUD funds would be used in compliance with HUD's obligations. For example, HUD suggested:

(a) That the City continue to maintain and operate the facility so that such maintenance and operation would indicate public control as opposed to private control (see Exhibits D-10 and D-11). In fact, Rouse maintains and operates The Gallery.

(b) That the Public Area be open to the public for a period of time greater than the business hours of the businesses in The Gallery (see Exhibit D-12). However, the Lease limits access by the public to the "Public Area" in the interior of the Mall so as to relate those times to operation of the retail shops.

(c) That the Public Area not be defined in the Lease as part of the Leased Premises (see Exhibit D-12). Section 2.1 is at least ambiguous in the definition.

(d) That the reversionary interest of the Authority not be subject to the lien and encumbrance created by the mortgage obtained by Rouse. It was made subject to such mortgage.

(e) That the Lease incorporate a definition of "security purpose" (see Exhibit D-14) which was not done.

26. Rouse provides security and maintenance for The Gallery, including the Public Area. It is not clear whether this is Rouse's primary responsibility or whether this expense is to be reimbursed. Rouse controls access to The Gallery at times other than a half-hour before, during and a half-hour after the businesses are open.

Pursuant to an interim agreement, Gimbels, Strawbridge & Clothier and Rouse pay towards the repair, maintenance and insurance for the Public Area. However, pending an agreement with respect to formation of a corporation which would provide maintenance, etc., Rouse has been paying substantially greater amounts for such maintenance than it was required to pay under either the Lease or the interim agreement.

27. Exhibit D-16, a July 9, 1975 letter from the City of Philadelphia to HUD, is not binding on the plaintiffs because neither the City nor HUD is a party to the Lease. The statements about the Public Area in The Gallery differ materially from, and in fact are in conflict with some of the Lease provisions dealing with the Public Area. Such letter is not binding on Rouse as to how the Public Area would be used in the future. Further, and in any event, the statements with respect to the Public Area are prospective in nature.

28. On December 3, 1976, Gimbels Realty leased to Rouse the parcel of land adjacent to and contiguous with the first level of the premises leased from the Authority, which contains a space known as Market Fair, for approximately twenty-five fast food restaurants.

29. On October 12, 1977, Gimbels Realty leased to Gimbels the Gimbels Store at Tenth and Market Streets and the Market Fair portion of The Gallery (subject to the prior lease to Rouse) and the bricked-in colonnade areas adjacent to the Gimbels store.

30. The three Gimbels colonnades are covered overhead by an extension of Gimbels' building to the adjacent sidewalk. A major portion of all three colonnade areas is subject to easement rights granted by Gimbels to the Authority.

31. Easement three involves most of the colonnade area on the corner of 10th and Market Streets. The specific easement is "for a colonnade . . . The easement is subject to a perpetual easement for public stairs as a means of ingress and egress to the pedestrian mall."

32. Easement five granted by Gimbels to the Authority covers the collonnade area on Filbert Street between 9th and 10th Streets. This easement is simply "for a colonnade."

33. Easement seven involves most of the colonnade area at 9th and Market Streets. This easement is "for a public right of way for a colonnade [and] is subject to a perpetual easement for public stairs as a means of ingress and egress to the pedestrian mall."

34. The only stated purpose of these easements is for public ingress and egress and for the construction of colonnades.

35. The portions of the colonnade areas on 10th and Market and 9th and Market directly adjacent to Gimbels' two main entrances are not subject to easements of any kind.

36. In the brickwork on the ground of all three colonnade areas, Gimbels placed metal plaques which state "SPACE WITHIN THESE LINES NOT DEDICATED." These plaques are in the brickwork immediately adjacent to the concrete sidewalk and refer to all of the property owned by Gimbels.

37. The plaque at the 10th and Market Street colonnade is missing. There is an open space marking the site where the plaque used to be. Such matter has no significance.

38. Rouse has subleased approximately ninety-four stores in the area leased from Gimbels and the Authority for use as retail business establishments. Executed and unexecuted examples of those leases were admitted into evidence as Exhibits P-38 and P-51, respectively.

39. The subleases between Rouse and its tenants provide that rent paid by the sublessees is dependent upon the sublessees' volume of sales.

40. There are presently approximately twelve vacancies for retail stores which Rouse has been attempting to sublet. The Court specifically invited the defendants to produce black entrepreneurs for any of these stores and indicated that the Court would expect them to be accepted as lessees if they were otherwise financially qualified. Defendants did not produce any applicants nor did they suggest any.

41. The newly constructed Gimbels store and The Gallery opened for business in August of 1977. Gimbels was the first department store constructed in a major eastern city in the last thirty-five years. The Gallery is the first major shopping mall constructed in a major eastern city.

42. The primary purpose of The Gallery is for the conduct of retail merchandising businesses. The Gallery is a retail shopping facility very similar to an enclosed privately owned retail shopping mall, such as the Cherry Hill Mall or Oxford Valley Mall.

43. Although The Gallery has two subway entrances and exits at the end of the 500 foot corridor extending from the Bull Market, it is not a transportation center.

44. The public areas and the public courtyards were not intended to be used for the purpose of demonstrating

or picketing or boycotting or for any purpose inconsistent with and destructive of the primary retail merchandising purpose of The Gallery.

45. It is reasonably estimated that The Gallery and the new Gimbels store at Market East will increase annual tax revenues to the City of Philadelphia by approximately at least 2.9 million dollars per year, which represents a six-fold increase from the amount of taxes previously generated from the property.

46. The next phase of expanding The Gallery is currently taking place. The Redevelopment Authority is in the process of acquiring the properties between Tenth and Eleventh Streets on Market Street. Approximately $12,000,000 in HUD urban renewal funds is to be used in this acquisition.

THE CONDUCT OF A BOYCOTT BY THE DEFENDANTS

47. On August 25, 1978, the defendants and others acting with them, totalling from 2,000 to 5,000 people, converged on Gimbels and The Gallery, commencing at approximately 1:00 P. M. At that time, the demonstrators massed at various locations in and around the entrances to Gimbels and The Gallery making egress and ingress to those entrances difficult and, at times, impossible. This demonstration marked the commencement of defendants' boycott against The Gallery and Gimbels (and Strawbridges).

The August 25, 1978 parade or march took on some of the characteristics of political protest primarily by elements of the Philadelphia black community. Various political figures and demonstrators gave speeches on a variety of subjects which focused primarily upon alleged racially discriminatory policies of the Mayor and the City

of Philadelphia, including alleged perpetration of brutality on blacks by members of the Philadelphia Police Department. There was some involvement of protest against alleged police brutality against a group called MOVE. There was also some involvement of protest against any governmental interference with the MOVE life style.

The boycotters engaged in general protest, in multiple ways, against the gamut of black social and economic grievances. For example, the boycotters constantly chanted in a forceful, loud, angry and militant manner, a version of "Won't take it any more." The protest was against all of the burdens and unfairness implicit in the social and economic condition of blacks as "second-class citizens."

48. The defendant, Milton Street, as the last speaker at the outside demonstration then proceeded to lead part of the demonstrators into The Gallery.

49. At about 3:00 P. M., on August 25, 1978, approximately 300 to 500 demonstrators entered The Gallery itself and moved in close procession throughout The Gallery, shouting and chanting very loudly. Slogans were directed at the City Government and its Mayor. Slogans were directed at supposed absence of black ownership of businesses in The Gallery. The shouting and chanting was so loud that normal conversation was impossible in the vicinity of the demonstration. A boycott of The Gallery was urged. The demonstrators occupied virtually all of the walkways, stairs and escalators in The Gallery. The demonstrators carried various objects, including umbrellas and signs, which they brandished in vigorous fashion. The signs contained various messages, including opposition to a proposed Charter change with regard to Mayoral succession and the Mayor's racial policies, and support for Milton Street's campaign for state office.

At various times during the demonstration, the demonstrators sat down and sprawled in the walkways of The Gallery and in the Market Fair area to listen to speeches given over portable amplifying equipment. During such times, egress and ingress to the shops in The Gallery, particularly the Market Fair restaurants, was blocked by the demonstrators, some of whom sat or stood on the dining tables in Market Fair.

There was considerable police presence, which was fully justified by the seeming possibilities and appearances that violence and mob action might occur. The conduct of the demonstrators was strident, angry and militant such as to convey apprehension that violence and mob action might occur. There was great hostility in the air and it was really a general protest about all black grievances in a white-dominated society. As a result, many businesses closed and patrons left The Gallery or refused to enter.

50. On Friday, August 25, 1978, after 5:00 P. M., the plaintiffs sought temporary injunctive relief for the purpose of preventing defendants from engaging in further acts of mass demonstration or picketing and from entering into The Gallery and Gimbels. This Court, as Emergency Judge, tentatively scheduled a hearing for 9:00 P. M., having previously received a request from defense counsel not to enter an *ex parte* order. The hearing was postponed at the request of plaintiffs' counsel to Saturday morning at 7:00 A. M., on August 26, 1978. At approximately 4:00 P. M., on the 26th, this Court entered an Order which, *inter alia,* limited the number of pickets which the defendants could employ to effectuate the boycott and placed restrictions on the conduct of such pickets. Specifically, the defendants were enjoined, *inter alia,* from preventing free ingress and egress to Gimbels, Strawbridge & Clothier and The Gallery; from interfering in any manner with the

businesses in the above locations; from singing, chanting or shouting in The Gallery; and from maintaining more than four pickets at any one entrance to Gimbels, Strawbridge & Clothier or The Gallery. In addition, the pickets were required to maintain a certain distance between one another and to remain in motion. The Order was essentially arrived at by agreement, after commencement of testimony and after various conferences between counsel and the Court.

51. On Saturday morning, August 26, 1978, approximately 70 to 100 demonstrators returned to The Gallery and Gimbels and engaged in basically the same kind of conduct as on Friday, August 25, 1978. The demonstration in The Gallery continued briefly after the Court's Order was served on the defendants. The defendant Street made a speech (using a bullhorn) in the Market Fair area to some 60 or 70 demonstrators. However, such conduct was consistent with a reasonable effort to organize the demonstrators and comply with the Court's injunction.

52. Since the events of August 25 and August 26, 1978, demonstrators have engaged in the following conduct some of which was improper, illegal and in violation of this Court's injunction Orders.

(a) The pickets sporadically blocked ingress and egress to and from Gimbels and The Gallery and massed in numbers exceeding those permitted by the temporary Order of the Court. On occasions the boycotters massed in and around the entrances to Gimbels and The Gallery at Tenth (and Ninth) and Market Streets. On occasions, for sustained periods of time, there have been as many as fifty or sixty demonstrators. Speeches have been given on the property owned by Gimbels, near its entrance and near the entrance to The Gallery at Tenth and Market Streets.

(b) Some demonstrators accosted prospective patrons of Gimbels and The Gallery, sometimes blocked and hampered their freedom of movement; and sometimes shouted at them. Some demonstrators put their hands out in gestures purporting to block the movement of patrons. Some obscenities and racial insults and other insults were directed at some prospective patrons at or near the entrances to Gimbels and The Gallery, particularly when they did not abide by the demands of the demonstrators to boycott.

(c) The demonstrators used the Gimbels' property to demonstrate, to set up a table for the purpose of registering voters and selling pretzels, although they were requested and instructed on various occasions by the Sheriff's personnel, as agents of the Court, to remove the table from Gimbel's property. They also set up chairs, boxes, signs, milk crates and other items on Gimbel's private property. Gimbels never gave any permission for such conduct. The demonstrators also conducted their protest and boycott activities on the steps and landing areas of the exterior courtyard.

(d) The demonstrators played cassette tapes over electronically amplified equipment on the corner of Tenth and Market Streets. These tapes contained obscenities. The subject matter of the tapes concerned an event involving the Philadelphia Police Department and the MOVE group and the efforts of the Philadelphia Police Department to arrest members of this group and remove them from a house which they were occupying. During that event, a police officer was shot and killed, following which an incident of alleged police brutality occurred, involving one of the MOVE members who was being taken into custody. Rouse, Gimbels and The Gallery businesses had no involvement whatsoever in the events involving MOVE and the Philadelphia Police Department.

(e) Racial slurs were directed at some black employees of Rouse Company. Some demonstrators called the supervisor of maintenance a "nigger" and referred to a female security guard as a "whitey lover."

(f) On some occasions after some patrons entered The Gallery, the demonstrators directed racial epithets and obscene language toward them. On some occasions, demonstrators demanded (with the use of obscene language) that patrons leave The Gallery.

(g) The demonstrators directed improper conduct to some tenants of Rouse. During the first week of the boycott, T. Milton Street and approximately twenty demonstrators entered the Ladybug store and demanded that Ladybug settle a dispute between a customer and the store management. The customer had previously demanded return of monies which she had paid as a down payment for lay-away merchandise. In accordance with the terms of the contract and store policy, the female manager of the store had refused to return the down payment. The customer left and returned with Mr. Street. After Mr. Street and his fellow demonstrators entered the store and demanded return of the money and indicated possible violence, the manager returned the money to the customer solely to avoid trouble.

Approximately twenty demonstrators entered the store in addition to other demonstrators immediately outside the door. The demonstrators blocked almost the entire floor walking area including the entrances into the changing rooms. The demonstrators chanted and intimated, after being admonished not to smoke within the store, that the store could be put on fire. These were serious acts of misconduct and such conduct constituted unlawful intimidation and infected the boycott with lawlessness.

(h) Shortly after the incident in the Ladybug store, a fire was discovered in a waste receptacle near the Ladybug store and in a trash receptacle near the area where the demonstrators passed after the Ladybug incident. In the year period prior to the boycott there had been four incidents of fires in trash receptacles in the concourse to the subways, but none had ever occurred inside The Gallery. On another occasion, a female demonstrator started two fires in the management corridor leading to the public restrooms in The Gallery. These fires were witnessed by several persons who were extremely frightened. Although the fires were quickly extinguished, they could have led to more serious consequences, including property damage and personal injuries. We find that the demonstrators improperly and unlawfully committed these minor fire incidents for purposes of general intimidation.

(i) On another occasion a defendant tripped one of the merchants in The Gallery as he was returning from a delivery of his product. After the tripping incident occurred, a number of defendants massed in front of the merchant's place of business and hurled obscene comments and racial insults at the merchant, who is a mild-mannered person. This event took place at the mall level of The Gallery where most of the pedestrian traffic occurs. The incident lasted approximately one and one-half hours. Both before and after the tripping incident, the boycotters engaged in angry, loud and boisterous conduct. One of the boycotters, Terrence Potter, a large, strong, young man, threatened the much smaller merchant and challenged him to fight. As a result of this type of nonsense, the Court barred Potter from participating in the boycott.

(j) The boycotters also threatened violence toward Gallery businessmen, patrons and personnel from

the Sheriff's Department and directed obscene language and used "fighting" words directed at merchants.

(k) On another occasion, approximately six or eight boycotters engaged in loud and boisterous conduct and used obscene language when a patron accidentally bumped into one of the boycotters. The boycotters were loud and boisterous. A large crowd of people gathered around on various levels of The Gallery. Another patron, an elderly woman, who voiced objection to the conduct of the demonstrators was told "to get the hell out of The Gallery" while she could still walk.

(l) On another occasion, after August 25 and 26, 1978, a demonstrator stood directly in front of a down escalator, which prevented its use by patrons and blocked exit from the escalator.

(m) On another occasion, Mr. Street stood in the doorway of one of the merchants blocking egress and ingress to the store for a short period of time.

(n) On several occasions, boycotters entered the stores of merchants of The Gallery without permission, in an effort to dissuade patrons from patronizing those stores.

(o) On three separate occasions since the boycott started, mice were released inside the mall under disruptive circumstances. The mice were white mice of the pet or experimental variety. There is obviously ground for suspicion because of all the circumstances, however, we shall regard the evidence as insufficient to connect the release of the mice in the mall with the demonstrators.

(p) In retaliation for the outspoken views of several of the merchants in opposing the boycott (and in violation of the Court's Order) the boycotters singled

out several merchants (McDonalds and Tiffany's) for special picketing and patrolling so as to adversely affect their businesses.

In addition to patrolling and picketing solely in front of the stores of these two particular merchants, the boycotters directed false and defamatory comments concerning the products purveyed by these two particular merchants. Defendants' false and defamatory statements concerning these merchants' products resulted in loss of goodwill and business.

(q) The picketers and demonstrators additionally violated the Court's injunction orders in many ways:

(1) the pickets were often stationary and were frequently fewer than the requisite number of feet apart;

(2) the pickets shouted in The Gallery and into Gimbels;

(3) the pickets entered into Gimbels store.

(r) The defendants were significantly undisciplined and disorganized and, at times, intended defiance to the Court's Orders, exampled as follows:

(1) Two boycotters (Terrence Potter and Harry Moon) were specifically precluded from being within two blocks of The Gallery because of their improper conduct prior to September 8, 1978. Both of these boycotters violated the court's injunctive order and participated in the boycott activities at The Gallery after the order was entered. They further violated the court's order in other respects, including using the amplifier to urge the boycott of The Gallery and to block and interfere with egress and ingress of patrons.

(2) Despite the order of the court, the electronic amplification equipment was used in an improper

and intimidating manner to direct comments to persons entering Gimbels and The Gallery, and to urge the boycott of particular stores in The Gallery. The amplifiers were used on Gimbels' private property, near the 10th and Market Street entrances to Gimbels and The Gallery, in violation of the Court's order entered on October 6, 1978. The sound amplifying equipment was used to repetitively and annoyingly shout "boycott" and for purposes other than to make a speech. The sound amplifying equipment was used to an annoying noise level.

(3) On October 6, 1978, the Court issued Supplemental Order No. 4 which prohibited any further demonstrating, leafletting, speechmaking, and boycotting inside The Gallery, the stores located therein, or the contiguous department stores. This order was issued as a result of a number of disturbing incidents in which the demonstrators, *inter alia*, improperly confronted the merchants and customers inside The Gallery.

The following day, T. Milton Street, inside The Gallery in violation of the Court's order, distributed forged and distorted copies of this order which included a copy of the Court's signature. The document greatly accentuated the words "BOYCOTT THE GALLERY" so as to convey the impression that this document was demonstration and leafletting material. Mr. Street's explanation of this palpable violation and perversion of the Court's order was that he was only communicating the Court's order. That assertion was facetious and not made in good faith. The use of the distorted leaflet and its distribution inside The Gallery was intended to be and was in deliberate defiance of and contemptuous of the Court's authority.

(4) One of the chief marshals, Hakim Boles, was involved in various infractions of the Court's orders, including the distribution of forged orders of the Court inside The Gallery at a time when any boycott activity in The Gallery was prohibited.

(5) One of the marshals, Harry Moon, never talked with or received instructions from the chief marshal. He stated that he did not know how to get in touch with the chief marshal. The defendants significantly failed to accomplish and maintain discipline or to establish an organization for control over demonstrators or to dissuade improper conduct. At least, in part, this failure was deliberate. The boycotters wanted to show defiance and they specifically wished to create some aspects of fear and intimidation so that patrons would not go to the The Gallery.

53. The aggressive nature of the picketing undoubtedly dissuaded many patrons from going into either Gimbels or The Gallery. Others who entered the stores showed anxiety and fear and reluctance to being exposed to such conduct again.

54. On September 16, 1978, an employee of Strawbridge & Clothier's tripped on one of the demonstrator's signs which was lying on the northeast corner of 10th and Market Streets. She injured her knee and shoulder.

55. On October 5, 1978, a demonstrator stated to the police that the demonstrators were going to stage a "shop-in" in which "the demonstrators (would) purchase large quantities of merchandise and as the sale (was) rung up, the buyer (would) cancel the order or they (would) buy the merchandise and return it the next day."

56. The activities at the voter registration table were part of the defendants' demonstration at Gimbels and The Gallery. The defendants are responsible for the acts of trespass and other violations committed by the demonstrators who maintained the table, and the amplifier attached thereto, on Gimbels' property and also for the demonstrators' improper use of that amplifier.

THE GALLERY AND GIMBELS ARE NOT GUILTY OF ANY RACIAL DISCRIMINATION WHATSOEVER

57. There is not a scintilla of evidence that Rouse engaged in any racial discrimination in its leasing activities. Rouse has leased to any qualified applicant. The uncontradicted testimony established that Rouse did not consider the racial, ethnic or religious background of applicants seeking to lease retail stores.

58. Many of the retail stores in The Gallery are owned and operated by publicly-owned national and regional corporations. It is impossible to determine the racial character of the owners of stock in such corporations.

59. Rouse has two kinds of leases, year-to-year or a multiyear lease for retail stores and month-to-month leases for kiosks and carts in an open area of The Gallery known as the Bull Market. Since The Gallery opened in August of 1977, two blacks have owned retail stores. One went out of business immediately before the boycott began. Blacks have operated kiosks or carts in the Bull Market at various times. Presently, only one black operates a business in the Bull Market. That merchant is presently seeking a year-to-year lease for a small retail store. Those negotiations were still pending when testimony concluded.

60. The only requirements for becoming a tenant of Rouse for the purpose of operating a retail establishment in The Gallery have been:

(a) A demonstration of financial responsibility, that is, the ability to pay for finishing the Retail Area in accordance with the terms of the Lease between Rouse and the prospective retail merchants and payment of one month's rent in advance.

(b) Having a product to sell which fits within a reasonable "product mix," that is, a product which is not sold by too many stores in The Gallery.

61. Rouse has had a number of vacancies in The Gallery available for lease by anyone, including blacks. The number of vacancies has increased since the boycott began. Since the boycott began on August 25, 1978, three stores have gone out of business before their leases had expired. One prospective merchant, who is a black, discontinued his negotiations for a retail store because of the boycott.

62. Approximately forty-five percent (45%) of the managerial personnel of all stores in The Gallery are black. Approximately forty-four percent (44%) of all employees of all stores in The Gallery are black.

63. Approximately sixty-eight percent (68%) of Rouse's employees are blacks and approximately fifty percent (50%) of its managerial personnel are black.

Irreparable Harm to Rouse, Gimbels and The 94 Gallery Stores

64. As a result of the boycott, at least in its initial stages, Gimbels sustained a loss of approximately 50% in its gross sales revenues. An initial 5 day sales loss of approximately $225,000 occurred after the boycott began. A store such as Tiffany's Bakery suffered a loss of approximately 35 to 45% in sales. Tiffany's was forced to reduce the hours of some of its employees as a result of the boycott. The Ladybug store closed on August 25 and 26, 1978 because of concerns about employee safety. Ladybug suffered a loss of approximately 74% in sales during the first week of the boycott. Bowl and Board suffered a loss of approximately 50% in sales after the first week of the boycott.

65. There is no question but that Rouse, Gimbels and all of the 94 retail businesses in The Gallery have suffered irreparable financial harm as a result of the defendants' boycott.

66. During the boycott, the number of vacancies in retail stores in The Gallery increased. No applications for retail stores were received after the boycott began. Rouse has suffered substantial losses in rent receipts based on sales volume, as a result of the boycott.

67. The boycott's portrayal to the public that Rouse, The Gallery and Gimbels are or have been guilty of racial discrimination has been and is unwarranted. Such false portrayal causes irreparable harm.

68. A civil judgment for damages would be meaningless because apparently none of the defendants have any significant assets from which a judgment could be satisfied.

69. Ad Hoc is a loose association of unincorporated associations with all indications that its members do not have any significant assets. The fact that Ad Hoc is represented by Community Legal Services must be deemed to indicate that there is an absence of any significant assets so as to satisfy eligibility requirements.

The fact that the defendants have no significant assets from which a judgment could be satisfied is not a factor to be considered for the grant of preliminary injunctive relief.

Irreparable Harm Suffered By the Redevelopment Authority and the General Public

70. The Authority developed the area in question for lawful purposes of generating increased tax revenues and eliminating blight. It was estimated that the area, as developed, would generate a six-fold increase in tax revenues. The boycott has caused a substantial loss of tax dollars. The boycott also threatens an increase in urban blight in the event Rouse ceases operations or terminates its Lease.

In addition to the loss of tax dollars, the boycott jeopardizes the ownership interest of the Authority in The Gallery. The reversionary interest of the Authority is subject to the lien and encumbrance of the leasehold mortgage of Rouse. If Rouse defaults on its mortgage of the leasehold interest, the reversionary interest of the Authority will be jeopardized.

Even if Rouse is not put into bankruptcy, the Authority and, therefore, the public will suffer loss of tax revenues and other substantial consequences if Rouse terminates the Lease because of the Authority's failure to provide Rouse with quiet enjoyment of the premises.

Absence of Dispute

71. There is no real, genuine or bona fide dispute between the defendants and Rouse, Gimbels, Strawbridges or any of the 94 retail businesses with regard to any subject-matter.

72. The plaintiff businesses have nothing whatsoever to do with or control over the expenditure of federal urban renewal funds or with public housing or housing rehabilitation. The plaintiffs have nothing whatsoever to do with charter change and mayoral succession or police brutality or the treatment of MOVE members, or problems of general unemployment or problems with regard to schools.

The Defendants Are Engaged in Scapegoat Picketing and Scapegoat Boycotting

73. The purpose of the boycott and picketing is to injure or destroy The Gallery to induce concessions from the City of Philadelphia. The Gallery has been targeted as the economic scapegoat for the defendants' grievances with governmental entities. Because the defendant's real and primary grievance is with third-party governments,

the defendants are engaged in scapegoat picketing and scapegoat boycotting.

74. Where the primary purpose of boycotting and picketing is to maliciously injure or destroy a business with which there is no dispute, and the message which the boycotters seek to convey is the fact of such injury or destruction, as warning or example or symbol of power, such boycotting is unlawful and may be enjoined.

75. The scapegoat boycotting of The Gallery businesses, which are not guilty of any wrongdoing whatsoever and which have no control whatsoever over the matters to which protest is directed, is unlawful and may be enjoined.

76. Scapegoat boycotting and scapegoat picketing, for the purpose of symbolically injuring or destroying arbitrarily selected businesses, is unlawful and may be enjoined.

CONCLUSIONS OF LAW

1. Picketing is a form of both assembly and of speech. It is protected by the First Amendment of the Constitution of the United States and by Article I, Section 7 of the Constitution of the Commonwealth of Pennsylvania. (*Wortex Mills v. Textile Workers U. of A.*, 369 Pa. 359, 85 A. 2d 851 (1952))

2. There are special circumstances attendant to picketing which characterize this form of expression as "speech plus" as opposed to "pure speech."

3. Picketing which by its nature contains mass picketing, coercion, intimidation or threats may be enjoined by the State. (*Wortex Mills, supra*)

4. Freedom of speech gives no right to injure another's business or property, and when the underlying

purpose of that expression is directed for this purpose, that expression is unlawful.

5. A State Court may enjoin unlawful picketing or picketing which is conducted in an unlawful manner or for an unlawful purpose. (*Wortex Mills, supra*)

6. A State is not required to tolerate in all places and in all circumstances even peaceful picketing by individuals; the method or conduct or purpose or objective of the picketing may make even peaceful picketing illegal.

7. Whether picketing is permissible or impermissible may turn on whether the picketer's activity incidentally harms a plaintiff's business in the pursuit of a primary and lawful purpose, or whether the primary purpose is to maliciously injure a plaintiff's business.

8. Like any other speech, picketing is protected by the Constitution as a means; however, it is not protected when used for the purpose of accomplishing an unlawful end. (*1621, Inc. v. Wilson,* 402 Pa. 94, 166 A. 2d 271 (1960))

9. People have the right to obtain equitable relief from a boycott which is conducted for an objective which violates a legitimate, clearly defined law or public policy of the state. (*1621, Inc. v. Wilson, supra*)

10. The defendants have no legitimate primary dispute with the plaintiffs. The defendants have no real or valid dispute of any kind whatsoever with the plaintiffs. Their real dispute is with governmental agencies and political figures.

11. There is not a scintilla of evidence that Rouse engaged in any racial discrimination in its leasing activities. Rouse has leased to any qualified applicant. The uncontradicted testimony established that Rouse did not consider the racial, ethnic or religious background of applicants

seeking to lease retail stores in The Gallery. There is no evidence that Rouse engaged in any discrimination in its hiring practices.

12. There is no evidence that Gimbels, Strawbridge & Clothier or any of the 94 retail businesses in The Gallery have engaged in any discriminatory practices whatsoever.

13. (a) Where the primary purpose of boycotting and picketing is to maliciously injure or destroy a business with whom there is no dispute, and the message which the boycotters seek to convey is the fact of such injury or destruction, as warning or example or symbol of power, such boycotting is unlawful and may be enjoined.

(b) Scapegoat boycotting and scapegoat picketing, for the purpose of symbolically injuring or destroying arbitrarily selected businesses, is unlawful and may be enjoined.

(c) Scapegoat boycotting and scapegoat picketing is illegal and beyond the pale of protected constitutional rights of free expression.

(d) The scapegoat boycotting of The Gallery businesses, which are not guilty of any wrongdoing whatsoever and which have no control whatsoever over the matters to which protest is directed, is unlawful and may be enjoined.

(e) The purpose of the boycott and picketing is to injure or destroy The Gallery to induce concessions from the City of Philadelphia and HUD. The Gallery has been targeted as the economic scapegoat for the defendants' grievances with governmental entities. Because the defendant's real and primary grievance is with third-party governments, the defendants are engaged in scapegoat picketing and scapegoat boycotting.

14. Each plaintiff's business and right to engage in business and right to engage in advantageous economic

relations is a property right protected by the Fifth and Fourteenth Amendments.

15. The mask of freedom of expression confers no privilege to damage or destroy the property rights of others. (*E. M. W. Bar Corp. v. Hilliard,* 20 D. & C. 2d 435 (1959))

16. It is unlawful to attempt to purposely injure another's business in order to induce or coerce concessions from a third party or governmental agencies.

17. The plaintiffs have no legal obligation to set up a fund to help minority housing or businesses in Philadelphia.

18. Rouse has no legal obligation to engage in affirmative action hiring practices, absent any showing of a past history of discrimination.

19. The merchants' interests are inter-related with Rouse's interests.

20. The primary purpose of the defendants' picketing, demonstrating, handbilling and boycotting is to injure or destroy The Gallery in order to induce or coerce actions and concessions from the City of Philadelphia, the Redevelopment Authority and HUD.

21. The defendants are conducting their boycott for an unlawful purpose.

22. Picketing may be enjoined if one of its objects is unlawful even though not the sole object. (*Anchorage, Inc. v. Waiters and Waitresses Union,* 383 Pa. 547, 119 A. 2d 199 (1956))

23. A person (or group of persons) commits the tort of inducing a breach of contract or a refusal to deal if, without privilege to do so, he induces or otherwise pur-

posely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another. Section 766 of the Restatement of Torts.

24. A person's business is a property right in the pursuit of which he is entitled to protection from tortious interference by third persons. Free access to his place of business is incident to such right. (*Truax v. Corrigan*, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375 (1921))

25. The defendants' boycott constitutes a tortious interference with plaintiffs' business.

26. A state, in enforcing some public policy, whether of its criminal or of its civil law and whether announced by its legislature or its courts, can constitutionally enjoin picketing aimed at preventing an effectuation of that policy. (*International Brotherhood v. Vogt*, 354 U. S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347 (1957))

27. If the purpose or one of the purposes of communication activities is to interfere with the right to engage in business of one with whom the demonstrators have no legitimate dispute, those activities are wrongful and may be enjoined. (*American Radio Assn., A. F. L.-C. I. O. v. Mobile S. S. Assn., Inc.*, 419 U. S. 215, 95 S. Ct. 409, 42 L. Ed. 399 (1974))

28. The unprivileged actions of the defendants in causing actual harm to the present and future business relations between and among the plaintiffs, between the plaintiffs and the public, and between Rouse and its tenants violates the law of this Commonwealth and constitutes tortious conduct under Section 766 of the Restatement of Torts, which has been adopted as the law of Pennsylvania.

29. The courts have a duty to protect the effectuation of public policies.

30. Where defendants are engaged in a conspiracy to maliciously injure plaintiffs' business or property, actions in furtherance of the conspiracy will be enjoined.

31. The defendants' picketing may be enjoined when engaged in for purposes contrary to the law and public policy of the state.

32. It is the public policy of the Commonwealth of Pennsylvania to promote the health, safety and welfare of the inhabitants thereof by the creation of Redevelopment Authorities, which exist for the public purposes of the elimination of blighted areas through economically and socially sound redevelopment of such areas in conformity with comprehensive plans of municipalities for residential, recreational, commercial and industrial purposes and otherwise encouraging the provision of adequate places for employment of people in the Commonwealth. (35 P. S. 1702)

33. The Redevelopment Authority of the City of Philadelphia is an agency of the Commonwealth of Pennsylvania created solely for the purpose of exercising the public powers of the Commonwealth and to carry out and effectuate the purposes and provisions of the Urban Redevelopment Law of 1945. (35 P. S. 1709)

34. One of the powers given to the Redevelopment Authority to carry out the redevelopment of blighted areas in the City is the power to own, clear, improve and manage real property. (35 P. S. 1709(J))

35. Private property does not lose its private character and its right to protection under the Fifth and Fourteenth Amendment merely because the public is gen-

erally invited on to that property for the purpose of conducting business thereon. (*Lloyd Corporation v. Tanner*, 407 U. S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972))

36. The First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on actions by private property owners in the nondiscriminatory private use of that property. (*Lloyd, supra*)

37. It is an unwarranted infringement on property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternate avenues of communication exist, because such an accommodation diminishes property rights without significantly enhancing the asserted right of free speech. (*Lloyd, supra*)

38. When private property is dedicated for a limited or restricted use any diversion therefrom to some purpose other than the one designated is forbidden. (*Brucker v. Carlisle Borough*, 376 Pa. 330, 102 A. 2d 418 (1954))

39. A dedication of property for the specific purpose of permitting public ingress and egress does not give members of the public rights to use such dedicated property as a place for demonstrating, picketing, congregating or any other exercise of First Amendment rights.

40. The two easements in the Market Street colonnades granted to the Redevelopment Authority are solely for the purposes of the public's ingress to and egress from Gimbels and The Gallery and for no other purposes. The public, therefore, has no right to use this property for vending, voter registration, picketing, handbilling, speechmaking or boycotting. (*Hudgens v. NLRB*, 424 U. S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976)

41. The easement in the Filbert Street colonnade granted to the Redevelopment Authority is solely for the purpose of constructing a colonnade and for no other purpose. The public has no right to use this property for vending, voter registration, picketing, handbilling, speechmaking or boycotting. (*Hudgens v. NLRB*, 424 U. S. 507 (1976))

42. In the conveyance from the Redevelopment Authority to Gimbels, several easements in favor of the Redevelopment Authority were created.

43. The language of the easements in the deed limits the privileges of use accorded to the Redevelopment Authority and its invitees to ingress and egress to and from The Gallery Mall.

44. The defendants have no rights to use Gimbels property as a place for demonstrating, picketing, congregating or any other exercise of First Amendment rights.

45. The defendants have an ample alternative forum available to communicate their messages immediately adjacent to the red bricked private property of Gimbels.

46. When a clear and present threat to the public safety, peace, or order appears, the State is empowered to protect the public safety and order. (*Commonwealth v. Geuss*, 168 Superior Ct. 23, 76 A. 2d 500 (1950))

47. The threat to the public safety is too great to allow any form of demonstrating, picketing and leafletting in the exterior courtyard area.

48. Loud speakers are indispensable instruments of effective public speech. (*Saia v. People of the State of New York*, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948))

49. The right of free speech is guaranteed to every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention. (*Kovacs v. Cooper,* 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513 (1948))

50. The government has no right to restrict expression because of its message, its ideas, its subject matter, or its content. (*Police Department v. Mosley,* 408 U. S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972))

51. Although the use of sound amplification may be instrumental to the exercise of free speech, time, place, manner and volume restrictions have been upheld. (*Phillips v. Township of Darby, Pa.,* 305 F. Supp. 763 (1969))

52. The right to use bullhorns is not absolute. The courts may enjoin the use of bullhorns where that use is improper.

53. Because of the defendants' improper use of their amplifying equipment to, *inter alia,* broadcast obscenities, rock music, tapes of MOVE demonstrations and directing the speakers into the Mall and Gimbels urging the boycotting of individual merchants, the defendants use of sound amplification equipment will be limited to reasonable and proper usage consistent with the circumstances.

54. The right to exercise free speech and assembly does not mean that everyone with opinions or beliefs to express, may address a group at any public place at any time. (*Cox v. Louisiana,* 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965))

55. The United States Constitution does not forbid a State from controlling the use of its own property for lawful nondiscriminatory purposes. (*Adderly v. Florida,*

385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149, reh. den, 385 U. S. 1020, 87 S. Ct. 698, 17 L. Ed. 2d 559 (1966))

56. Government ownership does not necessarily confer unlimited exercise of First Amendment rights to the public. (*Greer v. Spock,* 424 U. S. 828, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976))

57. The determination of whether a particular type of public property or facility constitutes a public forum requires a balance between the competing interests of the government, the speaker and the audience. (*Lehman v. City of Shaker Heights,* 418 U. S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974))

58. Traditionally, transportation centers and public thoroughfares have generally been appropriate forums for the exercise of First Amendment rights.

59. The primary and intended use of the public thoroughfares inside The Gallery complex is to provide the shopping-public with access to the stores.

60. Picketing, leafletting, demonstrating and boycotting activities in the common areas of The Gallery is incompatible with and disruptive to the primary use of the thoroughfares as means of ingress and egress. Therefore such activity may be prohibited inside The Gallery.

61. The primary and intended use of The Gallery is that of an urban shopping complex. Taking into consideration the history and purposes of The Gallery, its physical dimensions and the disturbing number of incidents between the demonstrators and customers, employees, and merchants, it is apparent that the defendants' rights to picket and exercise other First Amendment rights in the common areas of The Gallery is inconsistent with, disruptive of and incompatible with the intended function of those public areas.

62. A preliminary injunction may issue where (a) it is "necessary to prevent immediate and irreparable harm which cannot be compensated by damages;" (b) "greater injury would result by refusing the preliminary injunction than by granting it;" and (c) "until a final determination can be made, the decree properly restores the parties to their status as it existed immediately prior to the allegedly wrongful conduct." (*Alabama Binder and Chem. v. Pennsylvania Ind. Chem.*, 410 Pa. 214, 189 A. 2d 180 (1963))

63. In this case the defendants are inflicting great and irreparable harm upon the plaintiffs and the 94 businesses located in The Gallery.

64. Where the defendants have engaged in mass demonstration both inside and outside The Gallery, have wrongfully interfered with the plaintiff's property and business rights, have trespassed on plaintiff's property, and have intimidated and interfered with customers, employees and merchants inside and outside The Gallery, greater injury would result by refusing the preliminary injunction than by issuing it, and its issuance is necessary to prevent further immediate and irreparable harm.

IN THE
COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
TRIAL DIVISION

AUGUST TERM, 1978

No. 4145

ROUSE PHILADELPHIA INC.

and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,

Plaintiffs,

and

GIMBEL BROTHERS, INC.

and

GIMBEL BROTHERS REALTY CORP.

Intervening plaintiffs,

v.

AD HOC '78

and

T. MILTON STREET AS AN INDIVIDUAL AND AS A REPRESENTATIVE OF AD HOC '78 THE UNINCORPORATED ASSOCIATION OF PERSONS ACTING IN CONCERT TO BLOCK INGRESS TO AND EGRESS FROM THE GALLERY AT MARKET EAST

and

JOHN DOE AND JANE DOE

and

ALL OTHER PERSONS ACTING IN CONCERT WITH THE NAMED PARTICIPANTS OR OTHERWISE PARTICIPATING IN THEIR AID

Defendants

KREMER, *J.*

Dated: January 31, 1979

Supplemental Opinion
Sur Motion for Preliminary Injunction

We have held that defendants' boycott and picketing activity is for unlawful purposes and that such unlawful purposes taint the entirety of their First Amendment expressions. In the event it is determined that we are in error in banning all boycott activity, we shall spell out our views as to the manner in which any lawful boycott may be conducted. In that way we intend to make the record complete for such disposition as may be determined to be appropriate by any appellate Court, without any need for remand.

THE RIGHT TO PICKET ON GIMBELS' PROPERTY

Gimbels was granted permission to intervene as a party. Their principal separate contention is that the demonstrators should be enjoined from conducting their First Amendment activities on the private property of Gimbels.

The Gimbels' store is an enclosed privately owned and operated department store. It adjoins the west end of The Gallery and has entrances and exits from both the street and The Gallery mall. Gimbels' property includes three collonade areas located at the corner of Tenth and Market Streets, the south side of Filbert Street between

Ninth and Tenth Streets, and the corner of Ninth and Market Streets. The defendants have repeatedly demonstrated on the colonnade areas owned by Gimbels, in front of its two Market Street entrances. On numerous occasions, the defendants have placed a table on the red brick area owned by Gimbels for purposes in furtherance of their protest and for purposes of voter registration and for vending purposes.

We are asked to decide two issues concerning the colonnade area owned by Gimbels. First, we must determine the nature of the property in dispute. Second, we must decide whether the nature of that property provides for or precludes the defendants' exercise of First Amendment rights on that property.

The three colonnade areas are located on the street level. Located under the overhang of the store structure, the colonnade areas are within the boundary lines of Gimbels' building. The colonnade areas are surfaced with red brick and are distinguished from the concrete sidewalks which they abut.

In the conveyance from the Redevelopment Authority to Gimbels various easements were created in favor of the Redevelopment Authority, including separate easements covering the three colonnade areas.

Easement Number Three in the deed covers the area at the corner of Tenth and Market Streets. In pertinent part it provides for "an easement . . . for a colonnade," and "is subject to a perpetual easement for public stairs as a means of ingress and egress to the pedestrian mall." Easement Number Five provides for " a colonnade" on the South side of Filbert Street between Ninth and Tenth Streets. Easement Number Seven provides for "an easement . . . for a public right of way" at the corner of Ninth and Market Streets and "is subject to a perpetual easement for public stairs as a means of ingress and egress to the pedestrian mall."

In the operation of its business, Gimbels extends to the public an invitation to come onto its property for the limited purposes of ingress and egress to Gimbels, The Gallery or the transportation facilities and for purchasing goods and services. Such invitation does not include leave or license for members of the public to use any portion of its property for purposes inconsistent with its business purposes.

With respect to the proposition that the easements are of a general rather than limited nature, the rule is that "(t)he extent of an easement created by a conveyance is fixed by the conveyance." RESTATEMENT OF PROPERTY, Sec. 482 (1944). "Extent of an easement" means "the limits of the privileges of use authorized by the easement." *Id.*, Comment at 3009.

Here, the language of the easements limits the privileges of use to ingress and egress to and from The Gallery mall. The easements are intended only to insure that the areas covered by them will remain open for that specific limited purpose; in the absence of such restrictions in the deed Gimbels could close off those areas completely and prevent access to The Gallery.

Gimbels has not dedicated the colonnades to the public. It has placed metal plaques in the ground in these areas which specifically state that Gimbels' property, including the colonnades, is *not* dedicated to the public. In the absence of the plaques and even assuming that the easements give evidence of an intent to make some sort of public dedication of the colonnade areas, that does not mean that defendants can engage in First Amendment activities within these areas. By their terms, the easements reflect a dedication for limited purposes of access to The Gallery mall. The plaintiffs, in their brief, correctly state:

> "Such dedications to the public for specific limited purposes are well-recognized and courts will en-

force their limitations. *Brucker v. Carlisle Borough,* 376 Pa. 330, 337, 102 A. 2d 418, 420 (1954); *Versailles Township Authority,* . . . 171 Pa. Super. at 387, 90 A. 2d at 586. Indeed, when a dedication is for a limited or restricted use, any diversion therefrom to some purpose other than the one designated is forbidden. . . . A dedication of property for the specific purpose of permitting public ingress and egress does not give members of the public the right to use such dedicated property as a place for demonstrating, picketing, congregating or any other exercise of First Amendment rights."

The United States Supreme Court has recognized the limited nature of an invitation extended to the public by owners and store operators in a shopping center context. In the first of a line of four cases, the Court stated in *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U. S. 308, 319-20, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968) that a large shopping center constituted property of a public nature, as to which the State could not delegate its power, through the use of its trespass laws to wholly exclude "members of the public wishing to exercise their First Amendment rights on the premises in the manner and for a purpose generally consonant with the use to which the property is actually put." This view was premised on the Court's conclusion that the shopping center was the "functional equivalent" of the business district of the company-owned town in *Marsh v. Alabama,* 326 U. S. 501, 66 S. Ct. 276, 70 L. Ed. 265 (1946). However, Mr. Justice White dissenting in *Logan Valley* noted (at p. 338) the limited scope of the shopping center's invitation to the public:

"The public is invited to the premises but only in order to do business with those who maintain

establishments there. The invitation is to shop for the products which are sold. There is no general invitation to use the parking lot, the pickup zone, or the sidewalk except as an adjunct to parking. No one is invited to use the parking lot as a place to park his car while he goes elsewhere to work . . . some public property is neither designed nor dedicated for use by pickets or for other communicative activities. E.g., *Adderley v. Florida,* 385 U. S. 39, 17 L. Ed. 2d 149, 87 S. Ct. 242 (1966) . . . I do not agree that when the owner of private property invites the public to do business with him, he impliedly dedicates his property for other uses as well."

Mr. Justice Black noted in his dissenting opinion (at pp. 332-333):

"To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country. And of course picketing, that is patrolling, is not free speech and not protected as such. *Giboney v. Empire Storage & Ice Co.,* 336 U. S. 490, 93 L. Ed. 834, 69 S. Ct. 684; *Hughes v. Superior Court,* 339 U. S. 460, 95 L. Ed. 985, 70 S. Ct. 718. These pickets do have a constitutional right to speak about Weis' refusal to hire union labor, but they do not have a constitutional right to compel Weis to furnish them a place to do so on its property. *Cox v. Louisiana,* 379 U. S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487; *Adderley v. Florida,* 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149; *Cameron v. Johnson,* 390 U. S. 611, 88 S. Ct. 1355, 20 L. Ed. 2d 182."

The three dissenting opinions in *Logan Valley* (Mr. Justice Harlan wrote the third) proved to be a negative portent for the continuing vitality of the majority holding. Four years later, the Supreme Court decided *Lloyd Corporation v. Tanner,* 407 U. S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972). *Lloyd* presented the question of whether demonstrators had a right under the First Amendment to distribute handbills protesting American involvement in the Vietnam War in the mall of a privately owned shopping center. The Court held that here was no dedication of the *Lloyd* privately owned and operated shopping center to public use so as to entitle handbillers to exercise First Amendment rights therein that were unrelated to the center's operations. *Lloyd* further held that the petitioner's property did not lose its private character and its right to protection under the Fourteenth Amendment merely because the public is generally invited for the purpose of doing business with the shopping center's tenants. The *Lloyd* Court noted that the First and Fourteenth Amendments safeguard rights of free speech and assembly by limitations on state action, not on actions by private property owners in the nondiscriminatory private use of the property. The Court noted the balance of the Due Process Clause of the Fifth (and Fourteenth) Amendment which provides that "no person shall be deprived of life, liberty, or property, without due process of law," as against the First Amendment. The Court was additionally sensitive to "the further proscription in the Fifth Amendment against the taking of 'private property . . . for public use, without just compensation.'"

Mr. Justice Powell, speaking for the court, stated (at pages 567-8):

> "Although accommodations between the values protected by these three Amendments are sometimes

> necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."

A major consideration in the Court's holding in *Lloyd* was the availability of alternative avenues of communication accessible to the handbillers which would insure their rights without infringing upon the property rights of the petitioners. The Court noted (at page 567):

> "It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech." *Id.*, at 567.

In this case, alternative avenues of communication are available to picketers only a few short yards away from the private property of Gimbels. In *Logan Valley*, the picketers were restricted by the state trial court to picketing along the berms beside the public roads outside the shopping center. Because the vast majority of the picketers' intended audience drove into the parking lot of the mall by car, the picketers encountered difficulty in having a real avenue of communication open to their audience. In this case an available alternative clearly exists and the restriction does not inhibit effective communication.

On the same day that *Lloyd* was decided, the Court decided *Central Hardware v. N. L. R. B.*, 407 U. S. 539,

547, 92 S. Ct. 2238, 33 L. Ed. 2d 122 (1972) and held that petitioner's privately owned parking lot adjacent to its retail establishment was not subject to the exercise of First Amendment rights. The Court noted:

> "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes. The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are 'open to the public.' Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would . . . constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments."

The *Lloyd* Court took pains to distinguish their decision on its facts from their previous holding in *Logan Valley*. However, in *Hudgens v. N. L. R. B.*, 424 U. S. 507, 518-19, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976), the Court indicated that the rationale of *Logan Valley* did not survive the decision in *Lloyd*, noting that the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*.

Gimbels' store and adjacent property are far less available for First Amendment activities than the shopping centers in *Lloyd* and *Hudgens*. The defendants have a fully alternative forum available to communicate their

messages on public areas immediately adjacent to the privately-owned red bricked area. The holdings of the Supreme Court of the United States establish that the defendants are not entitled to demonstrate or engage in their First Amendment activity anywhere on Gimbels' property.

THE RIGHT TO PICKET INSIDE THE GALLERY

We turn to the issue of whether the defendants are entitled to picket and leaflet in the common areas and pedestrian walkways inside The Gallery. We must first consider the factual and legal nature of these public areas.

After the Redevelopment Authority filed its Declaration of Taking, it endeavored to clear the land which resulted in the assemblage of parcels seven and eight. Parcel seven was conveyed to Gimbels, in fee, and the present structure was built anchoring the western end of the Mall complex. The R. D. A. constructed the basic structure and basic shell for a Mall on parcel eight. It leased the land and structure for 99 years to Rouse. The R. D. A. reserved unto itself certain areas which are referred to in the Lease as "public areas." "Public area" means that portion of the project which is constructed wholly outside the leased premises, and which is intended for use by the public, including the non-exclusive use by tenant, sub-tenants and their customers and other invitees.

Article VIII of the Lease has provisions for maintenance and policing of the "public area" by R. D. A. R. D. A. is also responsible to provide liability insurance against claims for personal injury or death occurring in or upon the "public area."

Article XII grants for the benefit of the tenant and its licensees, sub-tenants, customers, agents and employees, non-exclusive easements for the use of the "public

area" for the purposes for which it was designed, including, without limitation, direct access to the truck service tunnel and the extended Eighth and Market Street Subway Station, and over the Filbert Street pedestrian bridge to the parking garage, which non-exclusive easements are to continue in existence for so long as the Lease and the tenancy continues in force. None of these public areas have been dedicated to the City, nor have they been dedicated or designed for other than the convenience of the public to pass from different modes of transportation through the public area to The Gallery, Strawbridges and Gimbels.

The property interests are therefore as follows: Gimbels has a fee simple interest in their property; the R. D. A. is owner of the fee in the land and the building which houses The Gallery; Rouse has a ninety-nine year lease as to large portions of the interior space within the Mall; [12] those areas not included in the leased areas are considered "public areas"; Rouse, the sub-tenants, and their customers have a non-exclusive easement in the use of the public areas; the public areas are owned by the R. D. A.

The defendants argue vigorously that they are entitled to exercise their First Amendment rights inside The Gallery on the common areas because they are publicly owned and intended for use by the public. Their first argument is based on the *Logan Valley, Lloyd, Hudgens* line of cases. The defendants correctly argue that *Hudgens* held that, absent municipal functions, or the "exercise of municipal functions or power," private property owners have no obligation to grant First Amendment rights on their own private property. The thrust of *Hudgens* clearly limits the exercise of First Amendment

12. Such 99 year lease is tantamount to private ownership.

rights in totally privately owned shopping centers. Each of the three "shopping center cases" involved privately owned shopping centers. The defendants contend that if the shopping centers had been publicly owned, First Amendment rights could not have been abridged.

The defendant's second principal argument is supported by a divergent line of cases which emphasize traditionally protected speech rights in the public forum. In *Wolin v. Port Authority of New York,* 392 F. 2d 83 (2d Cir. 1968) *cert. denied,* 393 U. S. 940, 89 S. Ct. 290, 21 L. Ed. 2d 275 (1969) individuals sought to picket and distribute handbills protesting against the Vietnam War inside the bus terminal owned by the New York Port Authority. The Court described the bus terminal as follows (at p. 89):

> "In design and physical appearance, the main concourse resembles a street. The fifty-foot walk is lined with stores and concessionaires, crowded at some hours and less dense at others."

The Court rejected the Port Authority's argument that the Terminal was an inappropriate site for such activity because the interior of a building was traditionally not the place for the exercise of First Amendment rights. The Court stated that view evidenced "too little regard for the vagaries of effective communication, and for the versatility of the First Amendment's proscription." The Court found the Terminal building most appropriate for speech activity noting (at p. 89-90):

> "Thus, we cannot accept the argument that the mere presence of a roof alters the character of the place, or makes the Terminal an inappropriate place for expression . . . like a covered marketplace area,

> the congestion justifies rules regulating other forms of activity but it seems undeniable that the place should be available for use in appropriate ways as a public forum."

Similarly, in *Chicago Area Military Project v. City of Chicago,* 508 F. 2d 921 (7th Cir. 1975) the Court upheld the right of individuals to exercise their First Amendment rights in the publicly owned O'Hare Airport. The Court rejected the airport argument that only a limited invitation is extended to the public to use the airport and that its often congested condition made the airport an inappropriate forum for First Amendment activity. The Court stated (at p. 925):

> "The proscriptions of the First and Fourteenth Amendments are primarily directed to governmental activity. But since O'Hare Airport is government owned and administered the Amendments are directly applicable to it".

The Court rejected the argument that cases such as *Lloyd* precluded First Amendment activity and distinguished those cases by noting they involved *privately* owned shopping centers.

The Court also rejected the argument that the public receives a limited invitation to use O'Hare Airport for travel purposes only by stating (at p. 925):

> "The City's claim that the public receives a limited invitation to use O'Hare Airport for travel purposes only is not supported by the evidence nor do we think it is realistic. For the fact is that great numbers of people are freely admitted to the public areas of the terminal buildings not only in connection

with air travel, but also for shopping, dining, sightseeing, or merely to satisfy their curiosity."

Finally the Court distinguished those cases where because of security or other appropriate reasons, publicly owned facilities such as prisons, hospitals and libraries may call for restrictive regulations appropriate to their functions. For example, the Court noted (at p. 925) that "traditionally state capitol grounds are open to the public. Jails built for security purposes are not."

The reasoning of *Wolin* and *Chicago Area Military Project* has been consistently followed by other courts. See *ISKON v. Engelhart,* 425 F. Supp. 176 (W. D. Mo. 1977) (Publicly owned Airport); *Kuszynski v. City of Oakland,* 479 F. 2d 1130 (9th Cir. 1973) (Publicly owned Airport).

The unmistakable thrust of these cases is to allow First Amendment activities in certain public forums such as streets, sidewalks and transportation centers while precluding the exercise of these rights in those public places where competing interests require greater weight such as courthouses, jails, hospitals, and libraries. The fact that an area is public is not alone the controlling factor, but it is a threshold ingredient which requires caution and further analysis, before there can be any First Amendment limitations. Courts must balance competing rights and interests of the public in order to determine the scope of permissible use of such public areas.

The defendants argue that the "public area" in The Gallery resembles a street lined with "numerous stores and concessionaires," that streets and sidewalks have historically been traditional forums for the exercise of First Amendment rights.

The defendants submitted substantial documentation supporting two important factual determinations. First, the federal government, acting through HUD, advanced

24.5 million dollars to fund the project upon the understanding that the public areas would, in fact, be public. Second, the construction of The Gallery is part of an overall project which includes and complements the construction of a transportation mall center. They contend that these two considerations have substantial bearing on the nature and use of the public areas.

In advancing urban renewal monies, HUD was concerned with protecting the public interest in the project. On several occasions HUD was not satisfied with proposed agreements or leases and requested changes in order to protect the public nature of the mall. On December 18, 1974, HUD's Area Counsel, wrote a memo to the HUD Area Director about the agreement between R. D. A. and Rouse:

> "Indeed we would suggest that the question of access to the public areas of the Mall is basic to the eligibility of the structure as a pedestrian mall. Accordingly, *we question the degree to which public access through the Mall will be assured.* Specifically, we ask, if the mall is truly a public area, shouldn't it be open to the public longer than business hours require? Moreover, in Exhibit C, to the Agreement (p. 42, Sec. 8.2) Rouse, as tenant, is granted the *right* to rent portions of the Public Area for special events, community and promotional activities, etc. *We seriously question in what sense the Public Area can properly be termed public if a private corporation has the right to rent said space.* We urge that Section 8.2 of Exhibit C be stricken." (emphasis supplied)

R. D. A. wrote a letter (D-18) to Hillel S. Levinson, Managing Director of the City of Philadelphia, informing him of the request for a letter jointly addressed to HUD and R. D. A. outlining the future operation of the public

spaces created in the Market East Transportation Center utilizing HUD Title I funds. Accompanying RDA's letter was a draft of the requested letter prepared by RDA for Mr. Levinson to sign. A copy of RDA's letter and the attached draft was sent as a carbon copy to Mr. Toombs of Rouse. This indicates that Rouse, the City, and RDA were aware and specifically informed of HUD's insistence on protecting the public interest in the project. Mr. Levinson wrote in his July 9, 1975 letter:

> "I understand that negotiations with regard to the proposed lease between the Redevelopment Authority and Rouse-Philadelphia, Inc., require certain assurances from the City of Philadelphia prior to final approval by the Department of Housing and Urban Development which will then lead to a lease execution before the end of the summer of 1975. In light of the fact that the Redevelopment Authority is essentially a pass-through agency which is carrying out the City's planning objectives in the Market East Project, this letter will assure the Department of Housing and Urban Development and the Redevelopment Authority that the public interest in the various public improvements designed and constructed with Federal Title I monies will be fully protected by the City of Philadelphia. Upon full completion of the Market East Project, including the commuter rail connection which forms a part of the Transportation Mall Center, it is the intention of the City to gear the hours of operation of the public pedestrian walkway to that of the operating hours of the commuter transportation facilities.
>
> * * *
>
> "The pedestrian ways created with Title I monies will serve the function of creating a humane public

> thoroughfare in an enclosed climate-controlled street separate and apart from the congestion, noise, and pollution of the City street system. Additionally, the enclosed public street will allow for ease of access to the many forms of mass transportation existing or proposed for the project area; . . .
>
> * * *
>
> "This letter will provide absolute assurance of the City's intention to adequately protect the public interest in all of the improvements designed and constructed with Federal Title I funds and that the operation and maintenance of such facilities will be sustained at a high level of quality."

Although the public areas in The Gallery were never formally dedicated, they were to serve as if they were. RDA wrote to Mr. Levinson on January 5, 1977 and stated:

> "While it is not presently intended that these areas be formally dedicated to the City (primarily due to the complex interconnection of public and private spaces), these public areas will function exactly as enclosed public rights-of-way."

In addition to these documents, the lease shows that responsibility for the operation, control, maintenance, security and repair of the public area of the Gallery is RDA's obligation.

The testimony shows that Rouse is in fact involved in the maintenance and security of The Gallery. This fact simply shows that RDA has allowed Rouse to perform part of RDA's responsibilities under the lease. Rouse expects to be reimbursed by RDA for those costs they have incurred. The fact that a public agency delegates its re-

sponsibilities to maintain a public area does not make the area less public.

The testimony of George Schaeffer, Director of Engineers for R. D. A. and for the construction of the Market Street East project, indicates that The Gallery is part of that project and that it is a retail facility. One of the major purposes was to establish a continuation of a public area to connect the various eventual modes of transportation. At the present time the public areas are only open in relation to shopping hours because there is no need to walk through The Gallery.

When other means of transportation are developed on the other end of the project, then the public concourse is to remain open so that connection may be made from one mode of transportation to another. After the new station(as part of the subway tunnel) is constructed it is contemplated the mall level would remain open from the station to the existing Lindenwold Line and the Eighth Street SEPTA subway, so that one would have access and could walk directly from the station to the subway.

We are fully satisfied that the lease documents and other documents clearly show a purpose to establish the public areas in The Gallery as in the nature of public thoroughfares. These thoroughfares can be used for purposes of strolling, access to stores, protection from inclement weather and access to transportation facilities.

The defendants argue that such enclosed public thoroughfares are similar to the enclosed pedestrian walkways in the City's airport. They argue that there will be two separate subway systems with numerous exits and entrances onto the mall level. Finally, and therefore, the defendants contend that these areas, like any other public thoroughfares, are traditional forums for the exercise of First Amendment activities.

We conclude that the defendants have taken too much comfort out of the fact that the public areas must be regarded as public thoroughfares. The fact that a property is owned by a public entity or a quasi-public agency does not automatically establish that such property is a proper forum for all modes of First Amendment activity. First Amendment activity which is inconsistent with and contrary to the normal use of such public property may be prohibited. This is particularly so when the government has acted in a proprietary capacity and has undertaken contractual or other obligations to members of the public. The concept of public space does not necessarily contemplate such broad unregulated First Amendment use of the space as to in essence destroy its public purpose.

In *Cox v. Louisiana,* 379 U. S. 536, 554, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965), the public forum issue arose in the context of a civil rights demonstration. While reversing a breach of the peace conviction because the statute was unconstitutionally vague, the Supreme Court commented about the public forum:

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."

Similarly, in *Adderly v. Florida,* 385 U. S. 39, 48, 87 S. Ct. 242, 17 L. Ed. 2d 149, reh. den. 385 U. S. 1020, 87 S. Ct. 698, 17 L. Ed. 859 (166) Justice Black rejected the argument "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." He stated

that "The United States Constitution does not forbid a state to control the use of its own property for its own lawful nondiscriminatory purposes." The defendants in *Adderly,* along with many other students, had demonstrated at a jail against previous arrests of other protesting students and racial discrimination. In upholding the State trespass convictions, the Court stated (at p. 47) that, "The State, no less than a private owner of property, has power to preserve the property under its control for the use which it is lawfully dedicated."

In *Greer v. Spock,* 424 U. S. 828, 836, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976) a military post regulation barring candidates wishing to distribute campaign literature and discussing election issues from entering the military reservation was challenged. The Court, per Mr. Justice Stewart, made it emphatically clear that government ownership does not confer to the public First Amendment rights:

> "The Court of Appeals was mistaken, therefore, in thinking that . . . whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now."

In *Lehman v. City of Shaker Heights,* 418 U. S. 298, 302-2, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974) a political candidate sought to purchase advertising space on vehicles of the rapid transit system operated by Shaker Heights, Ohio. The Court faced the question of whether a city which owned and operated a public rapid transit system and sold advertising space therein was required to accept paid political advertisements. The Court held that space

on public vehicles is not a First Amendment forum and that the city's rule limiting transit advertisements to commerical advertising violated neither the First nor the Fourteenth Amendments. The Court stated:

> "Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question."

In determining the appropriateness of the public forum for the exercise of First Amendment rights, the dissenting opinion also notes the importance of competing and conflicting interests. Writing for the four member dissenting minority, Justice Brennan's opinion notes the importance of balancing the competing interests (at p. 312):

> "The determination of whether a particular type of public property or facility constitutes a 'public forum' requires the Court to strike a balance between the competing interests of the government, on the one hand, and the speaker and his audience, on the other. Thus, *the Court must assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted.*" (Emphasis supplied)

These cases indicate that courts must make a reasoned analysis aimed at balancing the State's interest in using its property for a designated purpose against the public's right to exercise free speech.

In this case, we are faced with the question of whether the purpose and use of The Gallery's public areas

is compatible with the defendants' picketing exercise of free speech. In balancing these competing interests, we consider 1) the history and purpose of the forum, 2) the physical dimensions and character of the public areas and 3) the defendants' conduct in such areas and the interrelationship of these factors.

THE HISTORY AND PURPOSE OF THE GALLERY IS INCONSISTENT WITH ALLOWANCE OF PICKETING INSIDE THE GALLERY

The overall most important point on the issue of whether picketing should be permitted inside The Gallery, is that the Lease arrangements and the easement arrangements were intended overwhelmingly to safeguard public ingress and egress into and out of The Gallery and to safeguard rights of public passage through The Gallery for business not for transportation purposes. The primary purpose of The Gallery itself is to serve as an urban shopping complex. It was never agreed and it cannot be so construed that the public, acting through R. D. A. would use or permit the use of the public areas to defeat the retail purposes of the construction and the retail purposes of the lease.

It was the specific contractual intent of the parties that the public areas would be used for purposes consistent with and not antithetical to the general business purposes of the mall. By far, the major public purpose was to assure ingress and egress into and through the Mall, primarily for business purposes. Each enterprise, in turn, required that it be reachable from all other areas and entrances of the Mall and the public character of these areas was primarily a need of each of the businesses and only secondarily a need of the public.

Implicit in the business and contractual relationship of the parties is the understanding and agreement of the

public, as a contracting party, that it will not permit the public areas to be used to interfere with the lessees' peaceable enjoyment of the premises leased; that it will not permit the public areas to be used to defeat the very business purposes for which The Gallery is being leased. A landlord (R. D. A.) who leases premises to another for business purposes together with easements for ingress and egress through, on and in public areas cannot permit those same areas to be used for purposes of boycotting the tenant businesses. The R. D. A. as lessor, owes a duty to The Gallery businesses to assure them of quiet enjoyment of their premises. The defendants cannot compel a breach of that obligation. The public, as well as any other contracting party, is bound to deal in good faith with those who enter into business relationships with it. The government is not privileged to be dishonest or to deal in bad faith when it deals, in its proprietary capacity, with a lessee.

THE PHYSICAL DIMENSIONS AND CHARACTER OF THE PUBLIC AREAS ARE INCONSISTENT WITH ALLOWANCE OF PICKETING INSIDE THE GALLERY

The physical dimensions of the three levels of The Gallery have been described in our Findings of Fact. The various corridors vary in width along their lengths from about 12 feet to 30 feet and 12 feet to 60 feet. Other corridor areas are only about 10 feet wide. It is clear that the public areas of The Gallery were primarily designed to provide the shopping public with access to the stores. Although it is also clear that in the future The Gallery will be a component of a center city transportation center, that is a projection and does not yet exist. The two subway entrances or stops at the end of the 500 foot long corridor on the mall level extending from the Bull

Market does not analogize to the massive transportation centers described in *Chicago Area Military Project* (see 508 F. 2d at 925) or *Wolin* (see 392 F. 2d at p. 89). In the *Wolin* case the Court stated: "The terminal, with its many adjuncts, becomes something of a small city—but built indoors, with its 'streets' in effect set atop one another, and vehicles operating under, above, and to the side, not unlike some futuristic design for urban living." We conclude that The Gallery is not, at least at the present time, part of a transportation center of such character that it must be regarded as an appropriate forum for the exercise of free speech.

The use of the public areas for strolling, resting, convenience during inclement weather and access to public transportation is quite harmonious with the intended business uses of The Gallery and of the public thoroughfares. Picketing, demonstrating and boycotting present different considerations—such activities are disruptive of the business purposes of The Gallery and its public areas. Even Mr. Justice Brennan's dissent in *Lehman* negatives any right to engage in free expression in a public area which disrupts or defeats the primary use of the public property or facility.

The primary intended purpose of the public areas as thoroughfares is to provide prospective patrons with access to the stores. To allow those thoroughfares to be used for the opposite purpose of inducing people not to enter those stores and not to do business with those stores is directly destructive of the present primary purpose of the public area as a public thoroughfare.

It is obvious that the corridors as thoroughfares differ sharply from exterior streets and sidewalks in other significant ways. Noise reverberates and is louder to a much greater extent inside The Gallery enclosure than it is outside on the sidewalks. Shouting, screaming, chant-

ing and bull-horning becomes immediately oppressively annoying to other persons seeking to peacefully use the property. Shouting (angrily) in comparatively close proximity to others is immediately intimidating.

We think it is obvious that the R. D. A. (or the City) could not license vendors on the public areas. We think it is obvious that the R. D. A. could not properly authorize bicycling or skating in the Mall. A game of touch football in the mall corridors would have to be very short-lived.

We recognize that we must be careful not to engage in techniques of sophistical refutation. Nevertheless, the examples we give do highlight the fact that there are many significant differences between an exterior public street with its sidewalks and an interior enclosed mall corridor limitedly used as a thoroughfare.

On all three levels of The Gallery the corridors narrow to as little as ten feet in various places. Aside from any question as to the contradictory purposes of such anti-business demonstration in a business complex, such demonstration inside The Gallery presents safety problems as well as unavoidable and excessive confrontation problems. The fact that a patron has entered The Gallery is an implicit counter-message that the patron does not wish to honor the Boycott. The circumstances are such that the stage is set for confrontation, challenge and dispute. There have already been confrontations between demonstrators and merchants and between demonstrators and shoppers.

In the public areas adjacent to the Market Fair, people are stationary, sitting, resting, relaxing, browsing, reading and eating. These members of the public have the right to enjoy these facilities without having immediate accusatory confrontation that their usage of the facilities is in conflict with defendants' boycott. In the

approximately four foot wide management corridor (with its bank of eight phones on the wall) it would not only be manifestly quite inappropriate to allow picketing, it would be foolish.

We consider it clear, on multiple grounds, that the public areas of The Gallery are inappropriate forums for the exercise of picketing—First Amendment expressions which include urgings that The Gallery not be used at all.

In the urban climate of our times, protests lead to public apprehensions of physical violence and mob-like actions. The close proximity of the demonstrators to patrons in the enclosed and narrow corridors of the Mall is intimidatory. The public has the right to enter the Mall without being accosted accusatorily for having entered the Mall in the first place. Having entered the Mall as an invitee for a legitimate business or other purpose, the public has the right to be free from a request or demand to leave. To paraphrase the meaning of Justice Black in the *Logan Valley* case, it is against common sense to say that the government must allow its public areas to be used to discourage or defeat the intended purposes which the areas were to promote.

In both the *Wolin* case and the *Chicago Area Military Project* case the courts were concerned with the exercise of First Amendment pure speech rights. There were no disputes posited either directly or indirectly with the bus terminal or the airport. They were simply places for the dissemination of information and ideas. In the *Wolin* case it was noted that "the City does not contend that the activities of the plaintiffs do in fact obstruct airport traffic." In this case we are concerned with picketing, in circumstances quite significantly distinguished from pure speech. Most certainly in this case the exercise of free speech interfers with and obstructs the functioning and conduct of business at The Gallery.

THE DEFENDANTS' IMPROPER AND UNLAWFUL CONDUCT CONTRAINDICATES ANY ALLOWANCE OF PICKETING INSIDE THE GALLERY

The boycott began with a clearly unlawful massive invasion of The Gallery which effectively shut down all or most of the businesses in whole or in part. There was an overwhelming mass physical presence, in marching formations, coupled with very loud and militant shouting, singing and chanting. The civic memory of these events lingers on. The genesis and history of the boycott haunts the legitimacy of its conduct with fears of physical confrontations and fears of physical violence. The initial militant mass invasion planted seeds of fear in the community mind that shopping in the Mall was to risk getting involved in circumstances of possible violence.

There have been a number of unfortunate incidents inside The Gallery, in the public areas and elsewhere. These incidents occurred during the course of the trial, despite the Court's warning that such foolishness might interfere with the court reaching important constitutional issues, and despite the Court's warnings that the exercise of First Amendment rights could be forfeited or lost, in whole or in part, by reckless indulgence in lawless conduct.

As set forth more descriptively in our Findings of Fact, during the first week of the Boycott, Mr. Street and a group of more than 20 demonstrators unlawfully invaded the Ladybug store and coerced and intimidated the manager to return deposit monies to a customer. The boycotters recklessly engaged in massive confrontation and threats of violence and arson.

Racial slurs were directed at patrons and at black employees of Rouse. Demonstrators called Rouse's supervisor of maintenance a "nigger" and referred to a female

security guard of Rouse as a "whitey lover." Even after patrons entered The Gallery, the demonstrators directed racial epithets and obscene language toward them.

A female demonstrator started two fires in the management corridor leading to the public restrooms in The Gallery. These fires were witnessed by several persons who were extremely frightened. Although the fires were quickly extinguished, they could have led to more serious consequences.

On another occasion, approximately six to eight boycotters engaged in loud and boisterous conduct and the use of obscene language when a patron accidentally bumped into one of the boycotters. The conduct of the boycotters was so loud that a large crowd of people gathered around on various levels of The Gallery. Another patron, an elderly woman, who voiced an objection to the conduct of the demonstrators was told "to get the hell out of The Gallery" while she could still walk. On various occasions boycotters shouted over the balcony and yelled "boycott" repetitively in extremely loud voices.

In apparent retaliation for their outspoken views in opposing the boycott, the boycotters singled out certain merchants for special picketing. They picketed solely in front of MacDonald's and Tiffany's Bakery and directed disparaging comments concerning the products purveyed by these two particular merchants. Demonstrators entered the MacDonald's store and said that the hamburgers were bad, made of horsemeat and had maggots in them.

Demonstrators confronted Antonis Pantozopoulous, owner of Tiffany Bakery, because he testified on his own behalf. They shouted very loudly directly in front of and into his store that there were "boogies" in the cinnamon buns. A boycotter shouted that the buns were a bad stale product, bad for one's body and bad to eat. A boycotter told prospective customers that the buns were filthy and

she stuck her finger in her nose and then touched the product.

On another occasion one of the demonstrators, Terrence Potter, tripped Mr. Pantozopoulous and blamed him and and tried to pick a fight with him. Mr. Potter said, "You motherfucking white bastard, you tripped me." Mr. Potter was joined by Harry Moon, who said, "yeah, I saw you, you bastard, I saw you trip him." He said, "You know what we're going to do . . . break your jaw." These two younger and physically stronger boycotters challenged the older merchant to fight by saying "Come out of there, you bastard, come here, you fucker, and say that thing in front of me come right here in front of me and I will beat your ass." Potter and Moon continued to shout and curse in front of the store, saying, "Don't buy Tiffany's" and "don't shop." This conduct of the demonstrators was inexcusable in any civilized context. This encounter is illustrative of the great tension created by the demonstrators and their militant hostility. The public was being exposed to and subjected to such conduct in a closely confined space conducive to immediate personal physical contact.

Although not decisive in any way, the picketing of two specific businesses as a punishment for "talking back" to the demonstrators—i.e., as a punishment for a First Amendment expression of disapproval of the boycott—is of doubtful propriety.

Counsel for the defendants and the Boycott leader, Mr. Street, have indicated and announced that they will push to extremes (and beyond) any rights granted to them; that they will constantly test the boundaries of permissible conduct—and they mean precisely what they say.

After this Court entered its Supplementary Order No. 4 on October 6, 1967, enjoining all boycotting activity inside The Gallery and in the 9th and Market Streets courtyard area, Milton Street caused forged and distorted copies

of the order to be printed so that they read as a boycott message. The words BOYCOTT THE GALLERY were blown up to 4 times the size of the other words in the order and it was effectively only a boycott message.[13] The leaflet-document read as an Order and message from and signed by the Court to boycott. Then, in further arrogant defiance of the Court's order and authority, Mr. Street and others distributed these leaflets to the public *inside* The Gallery. The defendants engaged in a pretense that they were only obeying the order and communicating its content to their members. We did not consider such conduct to be clever and, to the contrary, the court considered that such behavior constituted criminal (as well as civil) contempt.[14]

The defendants are intent upon lawless confrontation; they are bent upon baiting the parties and the Court and they deliberately seek to make law enforcement difficult. We do not pass upon whether this is proper conduct for seeking social change. It may well be that the defendants engage in understandable (even forgivable) illegality. We are obliged to vindicate the law. Anticipation of constant judicial involvement with recalcitrant and, in essence, contemptuous and challenging defendants' behavior would force us to refuse to extend any cooperative hand where it has already been rejected. Although we have indicated multiple reasons why we cannot permit picketing inside

13. A copy of this leaflet is attached to this opinion as Exhibit "A". In the advertising and business fields the use and manipulation of type size for purposes of fraud or deception is well known. Sanctions are provided in various areas of the law for such deception.

14. The Court ordered and directed that the District Attorney initiate a criminal contempt (and any other appropriate) proceeding against Mr. Street and the District Attorney indicated that that would be done. Apparently nothing has been done to date.

The Gallery, there exists an additional reason which arises out of the defendants' own improper modes of conduct. The Court cannot be expected to constantly supervise the picketing and the court must consider that a "workable" order cannot be entered, given the defendants' intentions to constantly engage in violations. During the course of the hearings the Court warned the defendants that, although First Amendment rights are not to be deemed lightly forfeited, they were risking an abridgement of their rights by abusing them.

We are sensitive to the defendants' concern that, if they are in the legitimate exercise of their First Amendment privileges, they are entitled to reach a maximum audience. If we bar all picketing in The Gallery, then people who use the subway to enter The Gallery, may shop and leave by subway without ever having any opportunity to receive the boycott message. There are significantly less competing and conflicting interests along the 500 foot corridor which leads to the subway entrances. We will, therefore, allow two demonstrators to distribute leaflets in that area. Neither pickets' signs nor any amplification equipment will be allowed anywhere in The Gallery.

THE USE OF AMPLIFICATION EQUIPMENT

We next turn to the issue of the defendants' right to use bullhorns to communicate their messages. The plaintiffs have made repeated requests that all speech amplification devices be prohibited because the defendants have misused their bullhorns. We cannot ignore the relationship between the right to reach listeners and the use of such devices in the exercise of that legitimate pursuit. However, we recognize that misuse of sound amplification devices may infringe upon others' protected rights and the

right to use such devices is not absolute. We are faced with the question of determining the extent, if any, of speech amplification abuse and whether it is appropriate to regulate, or forbid, any further use of such equipment.

The Supreme Court of the United States has examined the constitutionality of municipal ordinances which have regulated or prohibited sound devices. "Loud speakers are today indispensible instruments of effective public speech." *Saia v. People of the State of New York*, 334 U. S. 558, 68 S. Ct. 1148, 1151, 92 L. Ed. 1574 (1948). Speaking for a divided Court, Justice Douglas stated for the majority:

> "In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound . . . Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of expressions in a preferred position."

In *Kovacs v. Cooper*, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513 (1949) the Supreme Court held that the "right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention."

Although the use of sound amplification equipment may be incidental to and instrumental in the exercise of free speech, restrictions as to time, place, manner and volume have been upheld. In *Phillips v. Township of Darby, Pa.*, 305 F. Supp. 763 (E. D. Pa. 1969) the Court held that it is not constitutionally objectionable for a state

to limit the operation of sound trucks as to time, place and volume.

Although the great majority of cases in this area involve local regulations of noise levels or sound trucks, we look to such law for guidance as to the appropriate rules to govern defendant's use of sound equipment in this case.

We are mindful that in the course of a demonstration that had already lasted over nine weeks by the time trial was completed, there were incidents of abuse and misuse. However, some of the defendants' uses of bullhorns deserve particular attention. The defendants played some so-called MOVE tapes which included profuse obscene language. MOVE is a group which lived in West Philadelphia until there was a violent confrontation with police officers. That confrontation resulted in one police officer's death and injuries to some MOVE members and other persons. The defendants also directed their speakers into Gimbels and The Gallery stores. The demonstrators used or constructed a platform on which they stood when using the bullhorn.

We must be sensitive to the protections afforded the use of the bullhorns. We have found the few incidents to which we referred to be exceptions to the generally lawful use of those devices. However, if such abuses recur, then we will have to determine whether the defendants have unlawfully abused the rights of others, and whether further use of sound equipment should be further limited or entirely enjoined altogether. We recognize that a loudspeaker may be used abusively as an assault on the right of others to converse, on the rights of others to enter the premises or on the concomitant right to do business with others. A stationary loudspeaker blaring constantly can become an overreaching nuisance and can expand into intimidation and a trespass upon the rights of others.

The elevated position of the platform causes the speaker to speak down to the pedestrians beneath them. It is intimidatorial that pedestrians are subjected to an elevated speaker equipped with sound amplification devices shouting directly at them as they pass below. It was also intimidatorial for MOVE speakers to shout obscenities from the platform at prospective patrons.

The MOVE element of the Boycott is a bizarre group bent upon tweaking the community nose by publicly indulging in practices offensive to the multiple senses of smell, sight and hearing. The group purports to be a sort of back-to-nature-group, bent upon supposed reversal of man's cultural evolution. Its philosophical principles are essentially incomprehensible except insofar as the group is nihilistic and anti-government. In the context of the Boycott the group really translates as a black protest against a dominant white culture which substantially excludes blacks from full meaningful participation in the available benefits of the society. Whether this is an appropriate form of leadership or a proper rallying ground is not at all a matter for judicial concern. Under our law, irrational as well as rational modes of thought must be protected. Impatience with societal nose tweaking is a dangerous luxury. Our only concern is that the expression of ideas cannot be done in such a way as to unlawfully trespass upon the rights of others. There is no right to stand upon a platform with amplifying equipment, for the purpose of addressing profanities to prospective patrons of The Gallery stores.

Intimidation is certainly one of the obvious effects of the usage of the amplification equipment in this case. It is well established that speech used to intimidate can be enjoined. *Wortex Mills, supra.* By barring use of the platform, we balance the public's right to be free from intimidation with the defendants' rights to effectively communicate in a reasonable and lawful manner.

The defendants have also directed the speakers into The Gallery and Gimbels. We will not permit such behavior. A bullhorn is to be used as an effective means of communicating the defendants' messages. When it is directed into the plaintiffs' stores and annoys and intimidates patrons inside the stores, such usage must be enjoined.

The defendants' bullhorns have with some frequency been too loud and raucous. In *N. A. A. C. P. v. Chester,* 253 F. Supp. 707 (E. D. Pa. 1966) the Court formulated a reasonable test for volume control. The court allowed a Chester ordinance to stand which restricted sounds which could be "audibly heard" at more than 100 feet from the amplifying machine. That is an appropriate and reasonable test for regulating volume. This solution considers the defendants' rights as well as those of the plaintiffs' and those pedestrians who will be subjected to the amplifying equipment.

Based on the foregoing, the following restrictions will be placed on the defendants' use of bullhorn or amplifying equipment; only one bullhorn shall be used; a platform shall not be used to elevate speakers using the bullhorn; the bullhorn shall be used solely for the purpose of making bona fide speeches; it shall not be used in an intimidatorial or chanting or other annoyingly repetitive manner; it shall not be directed into The Gallery or Gimbels; no obscenities are to be communicated through the bullhorn; it can only be used at least 30 feet from any entrance to Gimbels or The Gallery; it shall not have an amplification capacity for a greater distance than 100 feet.

PICKETING IN THE COURTYARD AREA

On October 13, 1978 we entered Supplemental Order No. 5 reciting "there is undue and unnecessary risk to

members of the public and other persons by permitting demonstration activity in the 'courtyard area' " and that "such 'courtyard' demonstration has intimidatory purpose and content" and we barred all picketing and boycotting in the "courtyard area." This order was entered after the Court visited and inspected and studied the area (and The Gallery in general) on various occasions.

We now turn to the question whether "the courtyard area" with its steps and landings is a permissible location for the defendants to engage in expressive conduct. Plaintiffs contend that this area has been leased to them in the lease agreement. They argue that the area is not public and, therefore, it is not an appropriate place for picketing or leafletting. The defendants contend that the courtyard area is "a park environment" where people come to relax, sit on the steps, sun themselves and engage in limited recreational activities. The defendants' rights to picket or not to picket in and around the courtyard area and steps do not rest on either of these contentions.

The courtyard area is that area on the immediate outside of what has been referred to as the "9th and Market Street" entrance. It includes four sets of steps coming from three different directions. On the Market Street side, the design consists of six steps, followed by a four feet landing, followed by another six steps, another landing, another six steps, another landing, then seven steps and then about an eight foot level walkway to the doors. The design is the same from the Ninth Street direction, the only difference being in the top tier, which has an approximately thirty foot concrete bench instead of the first set of six steps.

We have concluded that the appropriateness of defendants' rights to picket, distribute leaflets and demonstrate at this particular situs is governed by consideration

of the threats to public safety. In *Commonwealth v. Geus,* 168 Pa. Superior Ct. 23, 24, 76 A. 2d 500 (1950), the Superior Court held:

> "When clear and present danger of riot, disorder, *interference with traffic upon the public streets,* or other immediate threat to *public safety,* peace, or order, appears, the power of the State to prevent or punish is obvious." *Cantwell v. Connecticut,* 310 U. S. 296, 308, 84 L. Ed. 1213.

Hundreds of patrons walk down these steps each day to use that particular entranceway into The Gallery. In accordance with the standard in *Geuss,* we must balance the right to demonstrate at that particular location against the threat to public safety, which that demonstrating would cause.

The Court viewed the premises at The Gallery and at the courtyard area. The testimony indicated that people have been diverted from their direct path of travel to avoid confronting the picketers and leafletters. It must be borne in mind that persons approaching to enter The Gallery are doing precisely what the boycotters are asking them not to do and frequently in a strident and angry context. There is immediate confrontation. There is much greater risk of diversion of attention up and down the steps. There is much greater risk of spontaneous fear reactions upon the approach of boycotters. There have been no incidents of persons injured as a result of the interference with, or an attempt to avoid interference with, any of the demonstrators on the steps and landings. The chance of such occurrences, however, is a real risk. Although there is undoubted right to distribute leaflets on a public walkway, we must not lose sight of the fact that there is a converse right of the public not to accept those

leaflets or to be receptive to its message or messenger. Recognizing that some people wish to exercise the equal right of walking out of the way of the protestors, it is unnecessarily dangerous to allow picketing and leafletting on the steps. The threat to public safety is intolerably high when one considers, in the context of the steps, such factors as rain, snow, physical condition of the patrons, and decreased agility of some senior citizens. We cannot wait until someone sustains injury as a result of a mishap on the steps before we enjoin such activities. We must be mindful of the rights of all members of the public, not only those of the protestors. The threat to public safety is simply too great to permit any form of demonstrating on the steps.

The landings present the same problem. They are not large enough to safely accommodate the realities of the interplay between the demonstrators and the public. Again, there is legitimate concern with the threat to public safety.

The level area immediately between the last step and the doors to The Gallery is approximately eight feet wide. The two concerns at this location are the possible interference with people coming down the last couple of steps, and interference with those people exiting the doors. A demonstrator could not possibly be farther away than four feet from both the doors and the last step at the same time. If that demonstrator were to move farther away from either the doors or the steps, he obviously then moves closer to the other. Demonstrators, whether they be four feet away or eight feet away from the doors, would be too close to allow safe, unimpeded and unthreatened ingress and egress to and from The Gallery.

The defendants feel they have the right to reach every person that enters The Gallery. We have not found any authority which says that an order that allows "reach-

ing" only "ninety-eight per cent" of the audience is unconstitutional. However, we are mindful of the defendants' concerns. The defendants have argued that it is possible that persons could travel to The Gallery via underground transportation, relax in the courtyard for lunch, then return back to The Gallery and home, without ever having been contacted by the protestors. We find it inconceivable that someone in the courtyard would not be able to see and hear the message of the boycotters. This argument does raise the contention, however, that every would-be customer should first hear the message of the boycotters before they shop, so they would then have the option of honoring the protest. This argument does have some merit. Therefore, the order of this court will allow two protestors to be in the underground transportation section in the public transportation section of the mall level, to reach those people using the subway system. This addresses defendants' primary concern of reaching all the would-be customers, whether they enter from the public sidewalks or by the underground transportation system. Persons who use the subway system and then go to the courtyard will have exposure to the protestors. This ruling serves to accommodate both the protestors' concern of reaching their maximum audience, as well as the court's concern with protecting the safety and welfare of the public.

To "compensate" the defendants' loss of this courtyard forum, we granted premission to add four picketers to those already permitted at Ninth and Market Streets. Since we are required to balance the picketing rights of the defendants and the safety interests of the general public, by transferring these four demonstrators onto the public sidewalk we best accommodate both objectives.

There is attached hereto as Exhibit "B" an alternative form of consolidated Decree and Order which we would

enter in the event of a determination that we are in error in banning all boycott activity by the defendants with The Gallery as the boycott target.

BY THE COURT:

I. RAYMOND KREMER
J.

January 31, 1979

Exhibit "A"

We have been ordered by the court to communicate the following:

SUPPLEMENTARY ORDER NO. 4

AND Now, this 6th day of October, 1978, it is hereby ORDERED, ADJUDGED and DECREED:

That a further temporary injunction issue enjoining Defendants, individually and collectively; the members of Ad Hoc, an unincorporated association; and all persons acting in concert with them or otherwise participating with them from doing any of the following:

(a) Gathering, congregating, picketing, demonstrating, leafleting, speechmaking and boycotting and any activity in furtherance of a **BOYCOTT** in the Gallery, the stores located therein, or the contiguous department stores, including Gimbels;

(c) Entering onto Gimbels' bricked-in colonnade areas, to wit, the colonnade area near 9th and Market Streets, the colonnade area at 10th and Market Streets, the colonnade area on Filbert Street between 9th and 10th Streets, for any purposes other than ingress to or egress from Gimbels, the Gallery and the stores located therein; and

(d) Gathering, congregating, picketing, demonstrating, leafleting, speechmaking and boycotting and any activity in furtherance of a boycott at the mall level entrance and exit to **the GALLERY** near 9th and Market Streets and the adjacent steps and courtyard area.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

That the Sheriff of Philadelphia County, with the assistance, when necessary, of the Civil Affairs Unit of

the Philadelphia Police Department, or any other necessary law enforcement agency, is directed to use all power under the law to insure full compliance with this Preliminary Injunction;

That the Sheriff of Philadelphia County or his representative is to be present at all times during the term of this Injunction Decree at the Gallery at Market East and/or the areas contiguous hereto for the purpose of enforcing this decree; and

That individual Defendants are directed to communicate or cause to be communicated forthwith, to all members of Ad Hoc and all those acting in concert with them by means reasonably calculated to insure receipt thereof, the fact that an Injunction has been entered by his Court, effective immediately, and the contents of said Injunction. All other injunctive orders to continue in full force and effect except as modified herein. Same bond to stand.

BY THE COURT:

I. RAYMOND KREMER

J.

Exhibit "B"

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
TRIAL DIVISION

AUGUST TERM, 1978
No. 4145

ROUSE PHILADELPHIA INC.

and

REDEVELOPMENT AUTHORITY OF THE
CITY OF PHILADELPHIA,

Plaintiffs,

and

GIMBEL BROTHERS, INC.

and

GIMBEL BROTHERS REALTY CORP.,

Intervening plaintiffs.

v.

AD HOC '78

and

T. MILTON STREET AS AN INDIVIDUAL AND AS A REPRESENTATIVE OF AD HOC '78 THE UNINCORPORATED ASSOCIATION OF PERSONS ACTING IN CONCERT TO BLOCK INGRESS TO AND EGRESS FROM THE GALLERY AT MARKET EAST

and

JOHN DOE AND JANE DOE

and

ALL OTHER PERSONS ACTING IN CONCERT WITH THE NAMED PARTICIPANTS OR OTHERWISE PARTICIPATING IN THEIR AID

Defendants

CONSOLIDATED DECREE AND ORDER

AND Now, this —— day of ————, 1979, the Temporary Injunction Decree entered on the 26th day of August, 1978 and the five Supplementary Orders of this Court are consolidated into this decree and order and are modified and amended as follows:

It is ORDERED, ADJUDGED and DECREED:

1. That defendants, individually and collectively: the members of Ad Hoc, an unincorporated association, and all persons acting in concert with them or otherwise participating with them are enjoined from doing any of the following:

(a) Gathering, congregating, picketing, demonstrating, distributing leaflets, speechmaking, boycotting and/or engaging in any activity in furtherance of a boycott inside The Gallery building, the stores located therein, or the contiguous department stores of Gimbels and Strawbridge & Clothier; provided, however, that two persons shall be permitted to be in the corridor leading to the transportation terminals for the purposes of distributing leaflets. Those two persons are not permitted to be within thirty feet of the terminals;

(b) Entering into Gimbels' bricked-in colonnade areas, to wit, the colonnade area near 9th and Market Streets, the colonnade area at 10th and Market Streets, and the colonnade area on Filbert Street between 9th and 10th Streets, for any purposes other than ingress to and

egress from Gimbels, The Gallery and the stores located therein;

(c) Gathering, congregating, picketing, demonstrating, distributing leaflets, speechmaking, boycotting and/or engaging in any other activity in furtherance of a boycott at the mall level entrances and exits to The Gallery building, near 9th and Market Streets, the series of steps and landings adjacent thereto, and the courtyard area. Four pickets (demonstrators) are hereby authorized to demonstrate on the public sidewalks and at the street level immediately adjacent to the said "courtyard area" in the same manner and additionally to the other demonstrators authorized in this decree;

(d) Blocking ingress to and egress from The Gallery building, the stores located therein, or Gimbels or Strawbridge & Clothier, or preventing or attempting to prevent, by mass picketing, mass demonstration or coercion, or any threats thereof, or otherwise, any person or persons from freely entering or leaving The Gallery building, the stores located therein or the contiguous department stores, Gimbels and Strawbridge & Clothier;

(e) Interfering with, threatening to interfere with, hindering, or obstructing, or attempting to interfere with, hinder or obstruct in any manner by mass picketing, mass demonstration or otherwise, the business operations of plaintiffs, the merchants of The Gallery at Market East, Gimbels and Strawbridge;

(f) From using any voice or sound amplifying equipment within, in front of, near to or in close proximity to The Gallery building, the stores located therein, or the contiguous department stores, Gimbels and Strawbridge & Clothier; except that one sound amplifying device at any one time may be used, solely for the purpose of making

a speech, so long as such sound device is used on a city sidewalk at least 30 feet from any entrance to The Gallery building, the stores located therein or the contiguous department stores, Gimbels and Strawbridge & Clothier; from using a platform or other device designed to elevate the user or speakers of the bullhorn; from directing amplified speech into Gimbels or The Gallery; and from using speech amplification devices to communicate obscene language;

(g) From addressing any coercive or threatening language whatsoever to the patrons or potential patrons of The Gallery businesses or Gimbels.

2. That Terrence Potter and Harry Moon be enjoined from entering, congregating, picketing, loitering, or gathering at the premises known as The Gallery building, the stores located therein and the two contiguous department stores, Gimbels and Strawbridge & Clothier or within 1 block thereof.

3. That defendants, named above, be enjoined from congregating, loitering or gathering in front of, near to, or in close proximity to The Gallery building, the stores located therein, or Gimbels or Strawbridge & Clothier, except that defendants are authorized to demonstrate on the public sidewalks and at the street level immediately adjacent to the entrances and exits to The Gallery building and the contiguous department stores, in the following fashion:

(a) Picketing by no more than four pickets outside each of the entrances or exits to The Gallery building or contiguous department stores, Gimbels and Strawbridge & Clothier, at any one time; such pickets to be in motion at all times and spaced not less than 15 feet apart in a single line;

(b) Picketing at non-entrance areas by no more than three additional pickets on 9th Street, five on Market Street, four on 10th Street and four on Filbert Street; such pickets to be in motion at all times and spaced not less than 15 feet apart nor more than two abreast;

(c) All such persons shall strictly adhere to all of the aforementioned directives contained in this Order and shall conduct themselves in a manner so as not to block or interfere in any way with the use of such entrances or exits by any person desiring to enter or to leave said premises by foot or by vehicle.

IT IS FURTHER ORDERED, ADJUDGED and DECREED:

4. That the Sheriff of Philadelphia County, with the assistance, when necessary, of the Civil Affairs Unit of the Philadelphia Police Department, or any other necessary law enforcement agency, is directed to use all power under the law to insure full compliance with all of the terms of this Preliminary Injunction;

5. That the Sheriff of Philadelphia County is authorized, at all times during the term of this Injunction Decree, to have such personnel or representatives present at The Gallery building and/or the areas contiguous thereto as he shall deem necessary for the purposes of enforcing this decree;

6. That the individual defendants are directed to communicate or cause to be communicated forthwith to all members of Ad Hoc and individual members of the organizations comprising Ad Hoc and all those acting in concert with them, by means reasonably calculated to insure receipt thereof, the fact that this Decree and Order has been entered by this Court, effective immediately, and the contents of this Injunction Decree and Order;

7. That the two bonds heretofore filed herein by Plaintiff Rouse Philadelphia Inc. in the sum of $5,000 each, conditioned for payment of such costs and damages as may be incurred or suffered by any party found to be wrongfully enjoined and restrained, shall remain in full force and effect and no additional bond is required;

8. That this Decree and Order shall remain in full force and effect until such time as this Court specifically orders otherwise.

9. All orders and decrees heretofore entered are superseded by and are merged into this decree and order.

BY THE COURT:

_____

J.

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

TRIAL DIVISION

AUGUST TERM, 1978
No. 4145

ROUSE PHILADELPHIA INC.

and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,

Plaintiffs,

and

GIMBEL BROTHERS, INC.

and

GIMBEL BROTHERS REALTY CORP.,

Intervening plaintiffs

v.

AD HOC '78

and

T. MILTON STREET AS AN INDIVIDUAL AND AS A REPRESENTATIVE OF AD HOC '78 THE UNINCORPORATED ASSOCIATION OF PERSONS ACTING IN CONCERT TO BLOCK INGRESS TO AND EGRESS FROM THE GALLERY AT MARKET EAST

and

JOHN DOE AND JANE DOE

and

ALL OTHER PERSONS ACTING IN CONCERT WITH THE NAMED PARTICIPANTS OR OTHERWISE PARTICIPATING IN THEIR AID,

Defendants

Order and Decree

AND Now, this 28th day of February, 1979, the temporary and special injunction orders heretofore issued by this court and the Decree and Order heretofore issued by this Court on January 31, 1979 are modified and amended or amplified as herein set forth. It appearing that defendants contend that the scope and nature of the Decree and Order dated January 31, 1979, is not clear, the Court grants a reconsideration and acting *sua sponte*, it is Ordered and Decreed as follows:

1. Defendants, T. Milton Street and Ad Hoc '78, individually and collectively, the members of Ad Hoc, an unincorporated association, and all persons acting in concert with them or otherwise participating with them, together with their agents, servants and all persons acting in their interest or at their direction, are enjoined and restrained preliminarily, until final hearing, and thereafter until further order of this court, from engaging in a (scapegoat) boycott of The Gallery or any of the businesses therein or of Gimbel Brothers, Inc., or of Rouse Philadelphia Inc., and from picketing, handbilling, speechmaking, demonstrating or taking any other action in support of a boycott of The Gallery, or any of the businesses therein, Rouse Philadelphia Inc., or Gimbel Brothers, Inc., inside or outside The Gallery or Gimbels. All picketing, handbilling, speechmaking, demonstrating or other conduct in support of such boycott is unlawful and is hereby enjoined. All such conduct in furtherance or support of such unlawful boycott is prohibited in the City and

County of Philadelphia and, in particular, without any limitation by these specifications, is prohibited in any of the public areas of The Gallery, or any of the three colonnades located outside the entrance to Gimbels, or the exterior courtyard area, or the streets, sidewalks and sidewalks on the opposite sides of each of the streets which form the perimeters surrounding The Gallery, Gimbels and Strawbridge stores.

2. The Sheriff of Philadelphia County, with the assistance, when necessary, of the Civil Affairs Unit of the Philadelphia Police Department, or any other necessary law enforcement agency, is directed to use all power under the law to insure full compliance with all of the terms of this Injunction.

3. The Sheriff of Philadelphia County is authorized, at all times during the term of this Injunction Decree, to have such personnel or representatives present at The Gallery building and/or the areas contiguous thereto as he shall deem necessary for the purposes of enforcing this decree.

4. The two bonds heretofore filed herein by Plaintiff Rouse Philadelphia Inc., in the sum of $5,000.00 each, conditioned for payment of such costs and damages as may be incurred or suffered by any party found to be wrongfully enjoined and restrained, shall remain in full force and effect and no additional bond is required.

5. This Decree and Order shall remain in full force and effect until such time as this Court specifically orders otherwise.

6. All Orders and Decrees heretofore entered are superseded by and/or are merged into this Decree and Order. The Decree and Order dated January 31, 1979

is intended to remain in full force and effect as merged into this Decree and Order. Nothing contained in this Decree and Order shall be deemed to sanction or excuse any prior violations of the Decree and Order dated January 31, 1979.

7. Any and all findings of civil contempt for violation of this Court's Decree and Order dated January 31, 1979, heretofore or hereafter made by this Court, shall continue in full force and effect; provided, however, that any such civil contempt may still be purged (as provided in the Court's orders) by bona fide assurances that the contemnor will obey and comply with the Decree and Order dated January 31, 1979.

BY THE COURT:

I. RAYMOND KREMER
J.

IN THE
SUPREME COURT OF PENNSYLVANIA

No. 99 E. D. Misc. Docket 1980

AD HOC '78
and
T. MILTON STREET, et al.,
Petitioners,

v.

ROUSE PHILADELPHIA INC.
and
REDEVELOPMENT AUTHORITY OF
THE CITY OF PHILADELPHIA,
and
GIMBEL BROTHERS, INC.
and
GIMBEL BROTHERS REALTY CORP.
Respondents.

On Petition for Allowance of Appeal From the Order of Superior Court, October Term, 1979 Numbers 380, 390, 444, Affirming the Orders of the Court of Common Pleas of Philadelphia County, August Term, 1978, Number 4145

ORDER OF THE SUPREME COURT OF PENNSYLVANIA.

6/27/80—Petition for Allowance of Appeal denied.

Per Curiam

JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA AS CORRECTED.*

J 24/1979

IN THE SUPERIOR COURT OF PENNSYLVANIA

Nos. 380, 390 & 444 October Term, 1979

ROUSE PHILADELPHIA INC.

and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA,

Plaintiffs,

and

GIMBEL BROTHERS, INC.

and

GIMBEL BROTHERS REALTY CORP.,

Intervening Plaintiffs,

v.

AD HOC '78

and

T. MILTON STREET AS AN INDIVIDUAL AND AS A REPRESENTATIVE OF AD HOC '78 THE UNINCORPORATED ASSOCIATION OF PERSONS ACTING IN CONCERT TO BLOCK INGRESS TO AND EGRESS FROM THE GALLERY AT MARKET EAST

and

---

* Incorporating correction contained in letter from Prothonotary dated January 3, 1980.

JOHN DOE AND JANE DOE

and

ALL OTHER PERSONS ACTING IN CONCERT WITH THE NAMED PARTICIPANTS OR OTHERWISE PARTICIPATING IN THEIR AID,

Appellants

Judgment

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Orders of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

By THE COURT:

J. HANIEL HENRY
J. Haniel Henry
Prothonotary

Dated: December 28, 1979

III. QUESTIONS PRESENTED FOR REVIEW *

I. IS AN INJUNCTION AGAINST ALL SPEECH, HANDBILLING, PICKETING AND DEMONSTRATING IN THE CITY OF PHILADELPHIA URGING A BOYCOTT OF A BUILDING DEVELOPED AND BEING EXPANDED WITH PUBLIC MONIES CONSTITUTIONAL, WHEN THE OBJECTIVE OF THE BOYCOTT IS TO COMMUNICATE A MESSAGE TO GOVERNMENT REGARDING THE EXPEDITURE OF PUBLIC MONIES?

II. IS AN INJUNCTION AGAINST ALL SPEECH, HANDBILLING, PICKETING AND DEMONSTRATING URGING A BOYCOTT OF A BUILDING DEVELOPED AND BEING EXPANDED WITH PUBLIC MONIES AN UNCONSTITUTIONAL PRIOR RESTRAINT ON EXPRESSION?

III. ARE THE INJUNCTION ORDERS VAGUE AND OVERBOARD BECAUSE THEY ARE NOT CLEAR AND NARROWLY DRAFTED AND BECAUSE THEY SUPPRESS CLEARLY PROTECTED SPEECH?

IV. DOES THE CONDUCT OF THE PROTESTORS CONSTITUTIONALLY JUSTIFY A TOTAL BAN ON ALL SPEECH, PICKETING AND DEMONSTRATING URGING A BOYCOTT OF THE GALLERY ANYWHERE IN THE CITY OF PHILADELPHIA?

V. DID THE COURT OF COMMON PLEAS FOLLOW THE MANDATED PROCEDURES FOR CIVIL CONTEMPT, PROPERLY IMPOSE AN UNCONDITIONAL FINE PAYABLE TO THE CITY OF PHILADELPHIA AND FIND SUFFICIENT EVIDENCE TO HOLD T. MILTON STREET IN CIVIL CONTEMPT OF COURT?

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* Petition For Allowance of Review Filed with Supreme Court of Pennsylvania.

Supreme Court, U. S.
FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-477

AD HOC '78, T. MILTON STREET,
Petitioners,

v.

ROUSE PHILADELPHIA INC.; REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA; GIMBEL BROTHERS, INC.; and the GIMBEL BROTHERS REALTY CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT ROUSE PHILADELPHIA INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

DENIS V. BRENAN
THOMAS B. KENWORTHY
ROBERT J. DONAGHY
Attorneys for Respondent Rouse Philadelphia Inc.

MORGAN, LEWIS & BOCKIUS
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Philadelphia, PA 19109
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PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA, PA

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B. Should the Court review the decision of an intermediate state appellate court upholding the issuance of a preliminary injunction where the decision of the intermediate appellate court is in full accord with the applicable decisions of this Court? 1

II. BRIEF STATEMENT OF THE FACTS 2

III. ARGUMENT 4

The petition for writ of certiorari should be denied because:

A. The decision of the Superior Court of Pennsylvania sustaining the issuance of a preliminary injunction is not a reviewable "final judgment" 4

B. The decision of the Superior Court raises no important and novel questions which have not been previously addressed by this Court and those decisions were followed by the Superior Court 9

C. The decision of the Superior Court was engendered by events most unlikely to recur and the present impact of the judicial response to those events of two years ago is apparently of such slight degree that Petitioners have eschewed their rights under state law to demand an immediate final hearing 10

IV. CONCLUSION 11

The petition for a writ of certiorari should be denied.

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I. QUESTIONS PRESENTED

A. Is a decision of an intermediate state appellate court upholding the issuance of a preliminary injunction a "final judgment" such as to permit review by this Court, where Petitioners have not sought a final hearing, although entitled to such within three days upon demand, and where under state law the appellate courts apply a less rigorous standard in sustaining preliminary injunctions than in the case of permanent injunctions?

B. Should the Court review the decision of an intermediate state appellate court upholding the issuance of a preliminary injunction where the decision of the intermediate appellate court is in full accord with the applicable decisions of this Court?

II. BRIEF STATEMENT OF THE FACTS

On August 25, 1978, Petitioner, T. Milton Street, and a large group of persons estimated to be from three to five thousand strong, massed at various locations in and around the entrances to The Gallery, a downtown shopping mall in Center City Philadelphia which consists of approximately ninety-four privately owned businesses. They also converged on Gimbels Department Store located in the same area. Ingress and egress to both The Gallery and Gimbels was rendered difficult and, at times, impossible, by the group's activities. Street and three to five hundred of the demonstrators then entered The Gallery and marched throughout the mall shouting in loud voices and bringing business therein to a virtual standstill. Petitioner Street spoke to the throng with the aid of sound amplification equipment and urged a boycott of the businesses in the mall. (Findings of Fact 47-49, A. 85-A. 87; Superior Court Opinion, A. 2-A. 3).

At the *commencement* of Petitioners' activities "[t] here was no actual violence or threats of violence or destruction of property" (A. 30). However, "the conduct of the demonstrators was strident, angry and militant such as to convey apprehension that violence and mob action might occur", and as a result, the affected businesses were virtually closed. (Finding of Fact 49, A. 87).

The initial judicial response to Petitioners' conduct upon Respondents' motion was the entry of an order on August 26, 1978, which, *inter alia*, limited the number of pickets which Petitioners could employ to effectuate the boycott and placed restrictions on the conduct of such pickets (Finding of Fact 50, A. 87).

Commencing on September 6, 1978, and continuing episodically through October 26, 1978, the trial court heard testimony on Respondents' motion for a preliminary injunction. During the course of the hearing, Petitioners constantly engaged in conduct that the trial court found to be "improper, unlawful and in violation of [the] court's injunction Orders (Finding of Fact 52, A.88).[1] This conduct which included

[1] Although not set forth herein, ten pages of the trial court's findings of fact describing such conduct are replete with instances of outrageous and, at times, violent conduct (A. 86-A. 95). *See also* Superior Court Opinion, (A. 6-A. 7).

criminal acts of arson and extortion as well as various tortious acts, caused the trial court to enter several modifications of its August 26 order, which further restricted the Petitioners' activities with respect to the boycott.

On January 31, 1979, the trial court filed extensive findings of fact, conclusions of law and a written opinion. Concluding that both the manner of Petitioners' conduct and the purpose of their conduct were unlawful, the trial court entered a preliminary injunction order which modified and amended those temporary and special injunction orders previously entered. This preliminary injunction order enjoined Petitioners from "picketing, handbilling, speechmaking, demonstrating and boycotting inside or outside The Gallery or Gimbels . . ." (A. 67). The trial court defined the area from which Petitioners were enjoined from engaging in such activities as "the public areas [in The Gallery or Gimbels] or any of the three colonnades located outside the entrance to Gimbels, or the exterior courtyard area, or the sidewalk which forms the immediate perimeter surrounding The Gallery, Gimbels and Strawbridge stores." (A. 67) The issuance of this preliminary injunction decree was unanimously affirmed by the Superior Court[2] and a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied. (The vote of two of the seven Justices of the Court is necessary for such a petition to be granted.)

Notwithstanding the provisions of Rule 1531 (f) (1) of the Pennsylvania Rules of Civil Procedure,[3] Petitioners have elected *not* to make a demand for immediate final hearing.

---

[2] In addition to the sustention of the January 31, 1979 preliminary injunction decree, Petitioners seek review in this Court of a February 28, 1979 order of the trial court. No opinion in support of this order was filed by the trial court, and the Opinion of the Superior Court does not address this later order.

[3] This Rule provides that: "When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant."

III. ARGUMENT

A. The decision of the Superior Court of Pennsylvania sustaining the issuance of a preliminary injunction is not a reviewable "final judgment".

Pursuant to the provisions of 28 U.S.C. § 1257 (3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Petitioner's claim entitlement to seek review by this Court with the talismanic incantation that "this case involves the First Amendment to the United States Constitution" (Petition for Writ of Certiorari, at p. 1). Due to the procedural posture of the case, this federal issue is not ripe for review, and the judgment of the Superior Court is not a "final order" subject to review by this Court.

The judgment of the Superior Court merely sustained the issuance of a preliminary injunction upon the facts found by the trial court. The standards which must be satisfied under Pennsylvania law before a preliminary injunction may be issued are: 1) its issuance is necessary to prevent immediate and irreparable harm; 2) greater injury would result by refusing the preliminary injunction than by granting it; and 3) until a final determination can be made, the decree properly restores the parties to their status as it existed immediately prior to the alleged wrongful conduct. *Alabama Binder & Chemical Corp.* v. *Pennsylvania Industrial Chemical Corp.*, 410 Pa. 214, 189 A.2d 180 (1963); Trial Court Opinion, (A. 63-A.64). In recognition of the substantially less

rigorous standards for issuance of a preliminary injunction than those required for a permanent injunction, and the importance of First Amendment rights, the Supreme Court of Pennsylvania has provided in Rule 1531(f) (1) that:

> When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant. A final decree shall be filed in the office of the prothonotary within twenty-four (24) hours after the close of the hearing. If the final hearing is not held within the three (3) day period, or if the final decree is not filed within twenty-four (24) hours after the close of the hearing, the injunction shall be deemed dissolved.

The official note to this Rule recognizes that the three day period is the maximum permissible time and that in particular cases, a shorter period may be required. Petitioners have not availed themselves of the procedural safeguards of Rule 1531. Respondents who are not armed with the procedural mechanism to trigger an immediate final hearing have taken all necessary procedural steps to bring this case to final disposition in the trial court.

The standard of appellate review of the issuance of a preliminary injunction is extremely limited under Pennsylvania law. A trial court has broad discretion in deciding whether to grant or refuse a preliminary injunction. Accordingly, an appellate court will not decide the merits of the case on an appeal from an order granting or denying a preliminary injunction but will only consider whether any apparently reasonable grounds existed for the action of the trial court. *Pennsylvania Securities Comm'n* v. *Continental Mfg. Co.*, 465 Pa. 411, 350 A.2d 831 (1976); *Roberts* v. *Board of Directors*, 462 Pa. 464, 341 A.2d 475 (1975). Only if it is plain that no grounds exist to support a preliminary injunction or that the principle of law relied upon was palpably erroneous or misapplied will an appellate court interfere with the decision of a court of equity granting a request for temporary

injunctive relief. *Roberts* v. *Board of Directors, supra; Wolf* v. *Baltimore*, 250 Pa. Super 230, 378 A. 2d 911 (1977).

The substantive merits of the federal issue raised by Petitioners were not before the Superior Court, and accordingly that Court's *judgment*,[4] of which Petitioners seek review by this Court, did not, as a matter of state law, adjudicate the substantive merits of the federal issue.

Because the appellate courts of Pennsylvania have *not* by any means finally determined the federal issue present in this case, review of this case cannot be predicated upon the liberal interpretation of the final judgment rule which would permit review of state appellate court decisions by this Court even where there are further proceedings in the lower state courts to come. *See, e.g., Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-485 (1975). Moreover, this case does not fall within the four categories of cases discussed in *Cox Broadcasting*.

The first category of such cases is obviously not apposite, for the reasons set forth above, because it deals with those cases wherein the further proceedings in the lower court are preordained by the final judgment on the federal issue by the state appellate court. 420 U.S. at 479. The second category of cases consists of those "in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 486. In the instant case, the requirement for appellate review of the federal issue is totally *dependent* on the outcome of the future trial proceedings.

In the third category are those situations in which the federal claim has been finally decided, with further proceed-

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[4] The Superior Court *opinion* deals only with the appeal from the trial court order holding Petitioner Street in civil contempt of court. (A.2) In upholding the contempt order, the Superior Court, in a well-reasoned portion of its opinion, also discussed the substantive merit of the January 31 preliminary injunction order. Even in the context of the contempt order, however, the discussion of the substantive merits of the preliminary injunction order was *dicta* because as the Superior Court held: "Parties must obey a preliminary injunction, even if invalid, if the order is entered by a Court with jurisdiction over the subject matter of the order and the parties thereto unless the order is vacated or reversed." (A.15)

ings on the merits in the state courts to come, but where later review of the federal issue cannot be had, whatever the ultimate outcome of the case. 420 U.S. at 481. Such a result is not possible in the case *sub judice*. The only situation in which review of the federal issue would be precluded would be the situation where the federal issue is resolved in favor of Petitioners.

The final category of cases in which this Court has permitted review despite the pendency of further state proceedings includes those in which "reversal of the state court on the federal issue would be preclusive of any further litigation" and "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 482-483. Here, even a resolution of the federal questions as framed by Petitioners would not preclude further state proceedings. Secondly, no federal policy will be eroded by the denial of the Petition for a Writ of Certiorari and Petitioners have not suggested to the contrary.

Petitioners have made reference in their Jurisdictional Statement to *Organization For a Better Austin* v. *Keefe*, 402 U.S. 415 (1971). In *Keefe* this Court, noting that the injunction involved was termed a "temporary" injunction by the Illinois courts, considered whether it could properly decide the case pursuant to 28 U.S.C. §1257. Observing that the record was not such as to leave the matter entirely free from doubt, this Court concluded that it was not without power to decide the case reasoning as follows:

> We see nothing in the record that would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality. Moreover, the temporary injunction here, which has been in effect for over three years,

> has already had marked impact on petitioners' First Amendment rights.

402 U.S. at 418, n.*.

The doubts which the Court resolved in favor of jurisdiction in *Keefe* should be resolved against the assumption of jurisdiction here because the enunciated predicates for that decision are not present. The record in this case demonstrates that the Pennsylvania courts *do* apply a less rigorous standard in issuing and sustaining preliminary injunctions than in the case of permanent injunctions. *See* discussion at pages 4 and 5, *supra*. The record amply demonstrates that the January 31 preliminary injunction order culminated a series of progressively more restrictive temporary injunction orders which were necessitated by Petitioners' continued conduct which was not only unlawful and violent but contumacious. The record which will be established at the final hearing in state court will demonstrate the absence of such conduct since February 23, 1979. Accordingly, it would not be appropriate to conclude that the issuance of a permanent injunction in the same terms as that required temporarily in January and February of 1979 would be a "mere formality".

Finally, although the preliminary injunction has been in effect for almost 21 months, Petitioners have always had it exclusively within their power to cause the *preliminary* injunction to be substantively addressed by the trial court within at least three days of their demand.[5] Because Petitioners have elected not to exercise this right, a fair inference can be drawn that the impact of the preliminary injunction upon Petitioners' First Amendment rights has not been substantial.

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[5] Because of the procedural safeguards provided by Rule 1531 (f) (1) of the Pennsylvania Rules of Civil Procedure in the case of preliminary injunctions affecting freedom of expression, the rationale upon which jurisdiction was predicated in National Socialist Party v. Skokie, 432 U.S. 43 (1977) provides no support for Petitioners' jurisdictional claim in this case.

B. The decision of the Superior Court raises no important and novel questions which have not been previously addressed by this Court and those decisions were followed by the Superior Court.

Although not included within the Superior Court judgment sustaining the issuance of the preliminary injunction, the Superior Court, in *dicta*, did discuss the substantive merit of the federal issue in its opinion upholding the finding of civil conduct. The Superior Court opined that the preliminary injunction order prohibiting certain activity by Petitioners in a specific area was properly entered where the trial court had entered findings of fact that the purpose of Petitioners' picketing and boycott activities was to "injure or destroy The Gallery," businesses with which Petitioners had no dispute (A.99-A.100), and that the manner of these activities was infected by serious acts of misconduct and lawlessness (A.90). The questions presented for review as styled by Petitioners completely disregard these most basic and dispositive findings of fact which are of course not subject to review by this Court. Petitioners' characterization of the questions inaccurately reflects the issues which would be presented if the substantive merits of the federal issue were ripe for review. Petitioners' deceptively styled questions for review avoid the dispositive facts of record. Accordingly, even this Court's resolution of the questions presented by Petitioners in their favor would not advance the resolution of this litigation because of Petitioners' noncompliance with Rule 21.1(a) by failing to express the questions presented for review in the terms and circumstances of the case.

The substantive issues which would be presented had the Superior Court upheld a permanent injunction are not novel and have been heretofore determined by this Court. *See, e.g., American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974); *International Brotherhood of Teamsters, Local 695* v. *Vogt*, 354 U.S. 284 (1957); *Hughes* v. *Superior Court*, 339 U.S. 460 (1950); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949). The opinion of the Superior Court is in full accord with this precedent.

C. The decision of the Superior Court was engendered by events most unlikely to recur and the present impact of the judicial response to those events of two years ago is apparently of such slight degree that Petitioners have eschewed their rights under state law to demand an immediate final hearing.

The facts of this case wherein a group of individuals have chosen to injure and destroy completely innocent businesses which have no ability to cause the accomplishment of the putative objectives of that group; wherein those businesses are victimized by unlawful, violent and criminal acts; and wherein the judicial attempts to regulate that group's conduct are met with enunciations of intent not to abide by the trial court's orders and the continued contumacious disobedience of those orders, are most unlikely to recur. This Court's review of this case even if it could resolve this litigation, would not provide precedent of broad applicability. Denial of the Petition For Writ of Certiorari, rather than finally closing the courthouse doors on Petitioners, would open the state courthouse doors for final judicial response to Respondents' request for permanent injunctive relief, to be addressed in the context of the record as presented at the final hearing. Such a result is not unduly harsh to Petitioners who have spurned the procedural device which could have occasioned such a hearing by February 3, 1979 and who appear to be more concerned with theoretical legal arguments *in vacuo* than the actuality of judicial restrictions on their freedom of expression.

IV. CONCLUSION

For all of the foregoing reasons, Respondent Rouse Philadelphia Inc. respectfully submits that the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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No. 80-477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AD HOC '78 and T. MILTON STREET, et al.,

vs.

ROUSE PHILADELPHIA, INC.,

and

GIMBEL BROTHERS, INC.; GIMBEL BROTHERS REALTY CORP.,

and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Motion of Amicus Curiae for Leave to File Brief in Support of Petition for Writ of Certiorari and Brief Amicus Curiae

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OF PENNSYLVANIA

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

American Civil Liberties Foundation of Pennsylvania (ACLF) respectfully moves this Court for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorneys for the respondents was requested but refused.

The interest of the ACLF in this case arises from ACLF's belief that the lower court rulings impair the

ability of the citizens of Pennsylvania to exercise freely their first amendment rights. ACLF, an affiliate of the American Civil Liberties Union, is a non-profit corporation dedicated to the vindication of constitutional liberties in Pennsylvania. It is accordingly in ACLF's interest for this Court to grant *certiorari* and review the propriety of the lower court rulings.

The attached brief contains a more thorough discussion than petitioner's brief of when a state may restrain picketing for an unlawful purpose. *Amicus* believes this issue will be dispositive of the instant controversy.

Respectfully submitted,

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OF PENNSYLVANIA

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The petition for *certiorari* should be granted to resolve the scope of constitutional protection afforded to non-labor picketing.

The lower court misapplied the unlawful purpose doctrine as enunciated in *Hughes v. Superior Court*, 339 U.S. 460 (1950) by prohibiting picketing which advocated a result which in itself was not illegal.

The court did not hold that all picketing held as part of a consumer boycott was illegal. It enjoined picketing in this case because it believed that the target was "innocent." In so holding, the court impermissibly inquired into the content of the speech as the basis for suppressing it.

Interest of Amicus

Amicus, The American Civil Liberties Foundation of Pennsylvania, an affiliate of the American Civil Liberties Union, is a non-profit corporation dedicated to the vindication of constitutional liberties in the Commonwealth of Pennsylvania. *Amicus* believes that the lower court opinions jeopardize the ability of the citizens of Pennsylvania to exercise freely their first amendment rights in Pennsylvania. It is, therefore, in *amicus'* interest for this court to grant *certiorari*, and review the propriety of the lower court rulings.

ARGUMENT

The lower courts in this case have held that the advocacy of a politically motivated boycott through picketing may be enjoined when directed at a target that the court considers to be innocent. In reaching this result, the courts engaged in flagrant content-based regulation prohibited under the Constitution and have blurred a delicate but critical distinction between permissible regulation of conduct and impermissible regulation of speech.

The courts below purported to base their decisions on the "unlawful purpose" doctrine—the power of the state to restrain picketing when it could legitimately prohibit the result sought by the picketing. See *Hughes v. Superior Court*, 339 U.S. 460 (1950). In a dangerous misapplication of that doctrine, the courts have restrained picketing, not because of the result produced, but because they disagreed with the protesters' judgment. The unresolved question of federal law presented to this Court on *certiorari* is whether the unlawful purpose doctrine may be properly applied to a case where the picketing would not have produced an action or result that was itself illegal, apart from the motive, reasons or viewpoint of the picketer. Unless this Court resolves that question in the negative, picketing will become subject to an unlimited range of invidious content-based regulations.

In *Hughes v. Superior Court*, 339 U.S. 460 (1950), the Court upheld an injunction issued against picketers of a supermarket, who urged customers not to patronize a store which refused to employ blacks proportionate to their numbers in the community. Emphasizing that "the very presence of a picket line may induce action of one kind or another quite irrespective of the nature of ideas which are being disseminated," the Court held that unlike

"pure" speech, "picketing is not beyond the control of a State if the purpose which it seeks to effectuate gives ground for its disallowance." *Id.* at 465-66. Thus, as a corollary to the clear and present danger doctrine, the picketing may be restrained pursuant to the state's interest in preventing the action produced by the picketing. Since California could forbid "reverse" racial discrimination in hiring, it could restrain picketing which sought to produce such a result.

The lower courts in this case identified no comparable illegal result sought by the picketing. While the courts cited the state tort law against wrongful interference with a prospective contractual relationship, and the state's interest in the success of a government funded project, neither of these interests would be grounds for prohibiting the speech "irrespective of the nature of ideas" disseminated by the picketers.

The lower courts' finding that the advocacy of a boycott constituted a tortious interference under Pennsylvania law and could therefore be restrained simply disregarded the constitutional protection afforded commercial picketing. While the boycott urged by the protesters may have well jeopardized property interests of legitimate concern to the state, those interests must be accommodated with due regard for the constitutional rights of the protesters. *Cf., Thornhill v. Alabama,* 310 U.S. 88, 104 (1940) (while state has legitimate interest in regulating industrial relations, "[i]t does not follow that the state . . . may impair the effective exercise of the right to discuss freely . . . matters of public concern").

The tort of wrongful interference with a prospective contractual relationship is itself directed at speech activity and is not simply concerned with illegal conduct. Such direct restraints on speech will withstand constitutional

scrutiny only under limited circumstances, as outlined by the Court in *United States v. O'Brien*, 391 U.S. 367 (1968). The Court there established a four part test to determine whether activity having attributes of both speech and conduct may be constitutionally restrained.

> (W)e think it clear that a government regulation is sufficiently justified (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. The lower court decisions do not withstand scrutiny under the second, third and fourth parts of this test: the "property interests" protected are not sufficient to justify suppression of first amendment rights; the restraint is not content-neutral; and the injunction is grossly overbroad.

Mere injury to business does not provide a sufficient state interest to justify restraint of speech. Such a justification has been rejected not only in boycott cases, but in antitrust and defamation contexts as well. In *Missouri v. National Organization for Women*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 49 U.S.L.W. 3216 (U.S. October 7, 1980), and *Henry v. First National Bank*, 595 F.2d 291 (5th Cir. 1979), the Eighth and Fifth Circuit Courts of Appeals both concluded that politically motivated consumer boycotts could be restrained by neither the federal antitrust laws *nor* state "tortious interference" laws.[1] *See*

1. The protesters in both *The National Organization for Women* case and the *Henry* case were charged with violations of

also, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (state interest in protecting personal reputations not sufficient to justify restraint of speech flowing from enforcement of strict liability defamation laws).

Such a rule is also implicit in *Thornhill v. Alabama*, 310 U.S. 88 (1940), which held that picketing of a commericial establishment is a protected form of speech. As all picketing of a business may tend to discourage customers from dealing with the business, the state must demonstrate something more than such an injury to justify the restraint of picketing.

The lower courts here have attempted to provide that additional state interest in their finding that the protesters' true grievance was with the government, and not with the businesses boycotted. Analogizing the case to secondary labor boycott cases, the courts determined that the state had a legitimate interest in protecting "innocent businesses" from being used as a "scapegoat" in a dispute for which they were not responsible.

In so holding, the courts violated the third part of the *O'Brien* test: the speech was restrained not on the basis of the result of the speech, but on the basis of the content of the speech. The court did not find that all consumer boycotts were tortious, but only those boycotts where the target was innocent of any wrongdoing. Such a distinction implicated the lower courts in the very inquiry foreclosed by the first amendment: a consideration of the value of the speech. *See Police Department v. Mosely*, 408 U.S. 92 (1972). The protesters here asserted that the

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state tortious interference laws virtually identical to the Pennsylvania doctrine at issue here. *See* 620 F.2d at 1316, 1317; 595 F.2d at 303 n. 6. Both courts concluded that the states could not constitutionally prohibit conduct which, despite its intent to injure "innocent" businesses, was a protected form of petitioning the government.

black community should not patronize businesses that reaped the benefits of alleged misallocations of federal housing funds which would have otherwise gone to improve housing in black neighborhoods. The trial court did not question the sincerity of the protesters' political motivation, but simply disagreed that the businesses should be held accountable. The court thereby engaged in an impermissible judicial inquiry into the value of the speech.

The courts' reliance on secondary labor boycott cases as precedent for this type of content-based regulation is misplaced. The target of a secondary boycott is no more protected because he is "innocent" than a target of a primary boycott is not protected because he is "guilty." Rather, the crucial distinction is that the secondary labor boycott does not have, as its primary function, the communication of ideas. Despite the presence of non-speech elements, the picketing of a primary target is allowable because it serves a substantial communicative function—the dissemination of information concerning the facts of a labor dispute. *Thornhill v. Alabama*, 310 U.S. at 102. Secondary picketing serves no comparable communicative function. Picketing against a secondary target in the context of a labor dispute is not in any, but the most technical sense, the exercise of speech. It is rather the exercise of economic leverage used not to persuade or publicize but to coerce, coercion which could be conducted secretly as effectively as if conducted in public. *See* L. Tribe, American Constitutional Law, at 588 (1978) (test for determining whether regulation is directed at conduct or communication is whether activity sought to be regulated would be as objectionable if conducted in private as if conducted in public; if the activity would be objectionable if conducted in private then it can reasonably be asserted that regulation aimed at conduct and not speech). As such, a secondary labor boycott is less deserving of constitutional protection,

and does not outweigh the state's interest in protecting commerce, an interest which is not sufficient to justify restraint of true speech.

Thus, in commenting on the validity of secondary labor boycott prohibitions in *International Brotherhood of Teamsters v. Vogt, Inc.*, Justice Frankfurter noted that "this type of picketing certainly involved little, if any, communication." 354 U.S. 284, 290 (1957). *Cf., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 (1949) ("appellants were doing more than exercising a right of free speech or press . . . they were exercising their economic power together with that of their allies to compel Empire to abide by Union rather than State regulation of trade."); T. Emerson, The System of Freedom of Expression, at 444-49 (1970), cited in *Carey v. Brown*, 100 Sup. Ct. 2286, 2293 (1980) (labor picketing can be subject to more regulation than political picketing since less concerned with communication.)[2] Therefore, while a court may examine whether or not the purported "exercise of free

2. Professor Emerson points out some of the important distinctions between labor and non-labor picketing. Labor picketing has a special economic impact because of its institutional setting. It is conducted by closely knit, powerful organizations that are able to isolate an employer economically by the tradition that union labor will not cross a picket line. It is supported by a system of bureaucratic power based upon common economic interests, loyalties, social pressures, and economic sanctions. Labor picketing is therefore not an appeal to persuasion but merely the basis upon which pre-existing institutional mechanisms are called into play.

A comparable institutional apparatus is absent from non-labor picketing. It is, as in this case, conducted by small organizations without economic resources who have a narrower claim to the loyalties of their members. They do not have a strategic position over the target nor can they rely upon automatic institutional loyalties to support the pressure which is applied. Their appeal is directed to the general public as opposed to their own members. Picketing in these circumstances is communicative because it is an appeal to reason rather than a "signal" for the application of economic coercion.

speech" is merely a "sham" to cover illegal or anticompetitive conduct, *see, e.g., American Radio Association v. Mobile Steamship Association*, 419 U.S. 215, 232 (1974) (state court could legitimately examine whether true motive of boycott was to publicize problem or merely to coerce target by inducing union employees to refrain from crossing picket line); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972) (no first amendment immunity from antitrust laws where activity is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor"), a court may not discriminate on the basis of whether or not it agrees with the content or tactics of the protest.[3] *Carey v. Brown*, 100 Sup. Ct. at 2291 (1980).

There is no question that the protesters' only motive here was communicative.[4] The court should not have been permitted to consider further the correctness of the protestors' political judgment in determining their right to advocate the boycott.

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3. Because the lower courts engaged in prohibited content-based discrimination, this Court need not resolve whether or not a state may prohibit all consumer or political boycotts. Even if such a neutral blanket prohibition were constitutionally tolerable, the selective restraint of those boycotts with which the court disagrees can not be justified.

4. Indeed, the lower courts' analogy of this protest to a secondary labor boycott further breaks down on consideration of the absence of any non-communicative goal of the boycott. In contrast to a labor secondary boycott in which the principal purpose is to coerce a third party to exert his economic leverage on the primary target, the protesters here could not compel the boycotted businesses to exert any economic leverage on the "primary" target—the government. As the trial court acknowledged, the boycott was purely "symbolic," and the only advantage that could have been obtained from the boycott was the publicity and communication of the protesters' political conviction. Nothing in the trial court findings suggests that there was any other ulterior motive.

The courts' reliance on the fact that The Gallery was a government-funded project as grounds for restraining the boycott on "public policy" grounds is a clear example of the courts' fundamental misunderstanding of the "illegal purpose" doctrine. Contrary to the courts' apparent interpretation, the doctrine is not a *carte blanche* for the state to deem any picketing contrary to a government action as picketing for an "illegal purpose." Such an interpretation would stand the first amendment on its head by forbidding citizens from petitioning the government. Rather, the state's interest relied upon in restraining the picketing must be derived from a legitimate interest in prohibiting illegal conduct, independent of the existence of the picketing. While the government here might well have a substantial interest in the success of The Gallery, it could not make it illegal to refrain from patronizing the businesses there. Thus, picketing for the purpose of discouraging customers from patronizing The Gallery cannot be considered "for an illegal purpose."

If the state did have a legitimate interest in restraining the picketing it was because of the manner in which some of the picketing was conducted. *Amicus* does not quarrel with the interest of the state and of the respondents in insuring that the picketing would be peaceful and noncoersive. Rational limitations on the time, place, and manner of the picketing would have accommodated those interests without unduly interfering with the rights of the protesters. Instead, the Court enjoined all "picketing, handbilling, speechmaking, demonstrating, or taking any other action in support of [the] boycott" in the County of Philadelphia. Such a restraint was not directed solely at the coercive aspects of the protest, and impermissibly encroached upon pure speech. The injunction was, therefore, unconstitutionally overbroad.

CONCLUSION

For the foregoing reasons, *amicus*, American Civil Liberties Foundation of Pennsylvania, respectfully submits that the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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